88-680

Supreme Court, U.S.
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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

CLIFFORD Y.C. LAI and VICTORIA L. LAI,

Petitioners,

v.

CITY AND COUNTY OF HONOLULU,
a municipal corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Circuit Court should enter jurisdictional factual findings reversing a money judgment and dismissing the litigation rather than requiring Respondent City to first submit its belated and illusory administrative finality arguments to the District Court?

II. Whether the first prong of *Williamson* is applicable to reqduire reversal of a money judgment where the district court based the City's liability on Due Process, Equal Protection, and the facial invalidity/confiscatory taking grounds?

III. Whether the Circuit Court departed from the accepted course of judicial proceedings in purporting to review the evidence de novo while ignoring the detailed factual and legal findings of the District Court and substantially misconstruing this Court's decision in *Nollan v. California Coastal Commission*, ___U.S.__, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987)?

LIST OF PARTIES AFFECTED

All persons affected by this case are listed as parties in the caption.

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JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was entered on March 7, 1988, (Appendix A, at p. 1a). A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on July 21, 1988, (Appendix B, at p. 6a). Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2101(c). The basis of jurisdiction in the District court was 42 U.S.C.§ 1983.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution;provides in relevant part that:

> No person shall . . . be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides in relevant part that:

> No State shall . . . deprive any person of life, liberty or property, without due process of law . . . .

The Hawaii State Constitution provides in relevant part in Article I, § 5 that:

> No person shall be deprived of life, liberty or property without due process of law . . . .

The Hawaii State Constitution provides in relevant part in Article I, § 20 that:

> Private property shall not be taken or damaged for public use without just compensation [Am const con 1968 and election Nov 5, 1968; ren Const Con 1978 and election Nov 7 1978]

STATUTES AND ORDINANCES INVOLVED

42 U.S.C. § 1983, *Civil action for deprivation of rights,* provides in relevant part::

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

§ 6-909 Revised Charter of Honolulu 1973)(1984 Ed.) is set forth fully as Appendix F, p.38a; § 21-1205 of the City and County of Honolulu Comprehensive Zoning Code (1978 Cumulative Supplement) is set forth fully as Appendix G, pp. 39a-41a.; § 21-1206 of the City and County of Honolulu Comprehensive Zoning Code (1978 Cumulative Supplement) is set forth fully as Appendix H, p. 42a.

STATEMENT OF THE CASE

A. Introduction.

The primary issue in this case is whether Petitioner Lais' (the "Lais") successful inverse condemnation judgment against Respondent City and County of Honolulu (the "City") was properly

reversed with directions to dismiss the same, solely because the City alleged for the first time in its appeal that the Lais failed to pursue a purported variance remedy, thus preventing their claim from being "ripe" after eleven years of litigation. The City alleged the existence of an administrative variance procedure only after losing the $657,437.12 money judgment below on the merits; it raised the variance issue on appeal without delineating the existence of procedural rules, established precedent, Corporation Counsel opinion, or other evidence that such a remedy was more than a legal fiction developed purely to mislead the Ninth Circuit panel through the use of this "buzzword" so often misapplied by the courts without discretion.

The panel decision did reject the City's companion argument that the Lais failed to exhaust state judicial remedies, by correctly holding that the City had conceded that issue below. This concession is relevant herein, as it also demonstrates that the truth regarding the status of Hawaii law is merely optional with the City, and that the City demonstrates no credibility or ethics in its quest for victory. The panel decision did not reach the judicial exhaustion issue urged upon it by the City due to the concession (which the City denied) it had made in the trial court that the Lais had no remedy in the Courts of the State of Hawaii, but in any event existing case law demonstrates that Hawaii has no existing ordinance or judicial remedy process for inverse condemnation and virtually no possibility exists that the City or State of Hawaii might establish a remedy for inverse condemnation.

The Ninth Circuit, ignoring the failure of the City to raise the finality argument in the District Court, acted on unsupported jurisdictional facts of its own erroneous finding while ignoring detailed contrary findings by the District Court, in determining that a variance procedure was available to the Lais' twelve years ago. The record on appeal before the Ninth Circuit was and is totally devoid of any evidence that the applicability of the challenged ordinances was in any manner subject to limitation or amelioration through a purported variance procedure, or that the courts of the State of Hawaii would imply a variance to prevent an unconstitutional

taking. The decision below eliminated access to the federal courts for aggrieved property owners in Hawaii-a state whose history of refusing to compensate for takings of property rights is well-documented in the federal Courts.

Petitioners Lai contended then and now that the denial of a Certificate of Appropriateness by the Honolulu City Council, based on the specific and singular finding that the proposed development violated the height limitations of Ordinance 4488, was the last remedy available to them short of this litigation, as the combination of charters, ordinances, and zoning procedures which the City utilized to dazzle the Ninth Circuit panel are simply not available to the Lais due to the unique nature of special design districts within the City and County of Honolulu. The misrepresentations, conjecture, and last ditch tactics by which the City misinformed the Ninth Circuit could not have succeeded at trial or on remand, but the Ninth Circuit has, by remanding for dismissal only, denied the Lais a hearing to determine whether the variance process cited on appeal by the City was an available procedure to contest the applicability of the challenged ordinances. The result is a legalistic Catch 22; if the Lais proceed to seek a variance, and the same is denied not on the merits but due to unavailability, this case is permanently dismissed and the applicable statute of limitations has long since expired for this thirteen year old deprivation of property. This scenario is exactly what the Lais expect to occur if they are not at least given a hearing on remand to demonstrate that no such variance procedure is available.

B. The City Appropriated a Scenic Easement Without Paying Just Compensation.

The Lais derive their factual statements for this Petition from Judge Samuel P. King's detailed Findings of Fact and Conclusions of Law After Appeal and Remand (hereinafter "FF" or "CL"), which are set forth in Appendix C. The Lais bought a development leasehold interest in the subject property on May 26, 1971, for $300,000.00; the leasehold consisted of three periods of fixed (but increasing) rentals followed by rental re-opening periods, all expir-

ing totally in 2033. Appendix C, at p. 12a, FF 3. The property was zoned apartment and the applicable height limit was 350 feet. The Lais based their investment decision on the zoning and General Plan designation of the subject property, and Mr. Lai never considered that he would be denied the right to develop his property in the manner the surrounding property had been developed. Appendix C, at p. 13a, FF 8. After the Lais purchased their property, the City imposed development controls which the District Court found prevented the Lais from developing "their property as planned or in any economically reasonable manner, and are left with an old, dilapidated low-rise development of doubtful future value for development." Appendix C, at p . 13a, FF 11.

The Lais presented expert testimony at trial which was accepted by the court from Gerald H.W. Lum, AIA, regarding the impact of the enactment by the Honolulu City Council of Ordinance 4488 and its later successor ordinance 78-89 on the development of the property. The effect of the controls was to reduce the reasonably achievable height of the development from 80 to 25 feet, to reduce the number of units from 112 to 51, and to reduce to total aggregate floor area (apartment units plus common areas) from 67,536 square feet to 30,900 square feet. Appendix C, at p. 13a, FF 12. In addition, the challenged ordinances also increased substantially the open space required at ground level on the lot. Appendix C, at p. 14a, FF 14. As found by the trial court, these restrictions prevented any new construction, even of the maximum 51 units, from being an economically viable development, and the height and open space restrictions have prevented the Lais from interesting any developers in their property. Appendix C, at p. 15a, FF 20.

The trial court specifically found that the Lais have been denied "any and all economic use of that portion of the airspace over the thirty thousand feet of ground space, and that the legislative history of the ordinances clearly indicate that the "only stated justification and rationale of such stringent height regulations would be thwarted if Plaintiffs were allowed to use the portion of their airspace above the twenty five foot level in any manner." Appendix C, at pp. 13a-14a, FF 13. As the Lais cannot replace the

existing structures with an economically viable development, they have been forced to constantly repair the structures on the property with their own uncompensated labor. Appendix C, at p. 14a, FF 15. The City claimed without proof that the Lais investment is a money making proposition, but failed to introduce any evidence to support that claim. Appendix C, at p. 14a, FF 17.

The trial court specifically found that the Lais have been forced to continue to invest borrowed funds and personal labor into their leasehold investment, but that "they will never recoup their investment or make the development generate a reasonable return on investment." Appendix C, at p. 14a, FF 18. As the trial court concluded in Finding of Fact No. 21, "When this Court review the economic evidence realistically, the evidence proves: (a) the LAIS have received no return on their down payment or original investment; (2) the yearly cash flow for ten years has been negative or minimally positive and would be negative throughout if the value of Mr. and Mrs. LAI's personal labor is considered; (3) there is no real hope of development under the existing controls, and; (4) the situation can only deteriorate due to the advanced age of the structures and the future increases (both fixed and to be set) on the lease rental." Appendix C, at p. 15a, FF 21.

As to the City, the trial court rejected any notion that community planning was the cause, as it found that "No evidence has been presented to this Court which would indicate that Ordinances 4488 and 78-89 were enacted pursuant to a comprehensive plan or any community planning; in 1974 Defendant CITY had no Urban Open Space Plan, and it still lacks one at the time of trial herein several years later." Appendix C, at p.15a, FF 22. At the time Ordinance 4488 was enacted, the City's General Plan and General Plan Revision Program policy recommendations provided that the Punchbowl area was designated as the "primary locale of high density residential development..." Appendix C, at p. 16a, FF 29. The trial court also found that the purported "scenic view" created by Ordinance 4488 did not include any view from the adjacent Makiki district, was only a one block corridor adjacent to the elevated portion of the H-1 Freeway, that other views of Punchbowl

from Makiki were not studied, and that other available views from the H-1 Freeway were deemed not worth preserving by the City. Appendix C., at p. 17a, FF 32. The City's own "study ' (Exhibit 18 at trial) admitted that "the view corridor was defined by two masses of highrises, that the views are enhanced by elevation of the viewing platform (H-1 Freeway) between Liholiho and Ernest Streets, that Defendant CITY's general plan and detailed land use map both designate Plaintiffs' land for 'High Density Apartment', that the view of Punchbowl for Ewa bound travelers is obscured by high-rise construction, that development has obstructed views of Punchbowl by highrise construction, that within the [proposed] district itself, there are no major or significant viewing areas." Appendix C, at p. 17a-18a, FF 37.

Another study, by the Punchbowl District Advisory Committee, itself part of the legislative process, identified three serious defects in the proposed H-1 view corridor as "(a) the view of Punchbowl from H-1 freeway may pass unnoticed while traveling; (b) it is dangerous for drivers to attempt to observe Punchbowl from the freeway, and; (c) the view of Punchbowl is cluttered by high rise buildings to the point that it is not worth saving." Appendix C, at p. 18a, FF40. The trial Court also found that the planning record and evidence adduced by the City at trial "fails to demonstrate that the CITY attempted to do any studies or planning regarding the economic impacts of the ordinances, and nothing was included in the ordinances which in any way sought to ameliorate the economic impacts or spread them among the affected landowners or the public generally." Appendix C, at p. 18a-19a, FF 44.

Ordinance 78-89 substantially amended Ordinance 4488, both by expanding its area of application and by reducing (for unexplained reasons) the 40 feet height limit allowed by Ordinance 4488 on the rear or mauka ("mountain") side of the Lais property. The Lais, having been denied a Certificate of Appropriateness under the less restrictive Ordinance 4488, did not reapply before commencing litigation, as Ordinance 78-89 also eliminated any City Council discretion to authorize an increase in the height limits. By 1978 the Lais, having been ignored and excluded from the planning process, could observe other new developments projecting into the purported view corridor; they had been outside the narrow strip of

land governed by Ordinance 4488, and had utilized the next three years to obtain their permits before the effective date of Ordinance 78-89 on August 26, 1978. As the trial court found (but the Ninth Circuit panel failed to grasp), "There can be no administrative action which would lessen the harsh impacts of the regulation in the instant case, and Plaintiffs have been denied Certificate of Appropriateness under Ordinance 4488 based purely on the height of their project; no other procedures are available to Plaintiffs, as the regulation makes no provision for any discretion or administrative action." Appendix C, at 15a, FF 23. The district court also found that the Lais "submitted a development plan to Defendant CITY and exhausted all administrative remedies; Defendant CITY conceded that the proposed development was given a preliminary review and found to be in compliance with all provisions of the Comprehensive Zoning Code and Building Code, but denied Plaintiffs' Application for a Certificate of Appropriateness and request for permits on said property on September 15, 1976, solely because it would project into the view corridor established by Ordinance 4488. Appendix C, at p. 15a, FF 24.

In reaching its findings of fact and legal conclusions, the trial court clearly ruled against the City on every conceivable basis. It's conclusions leave little doubt that it found the Ordinance to be arbitrary and failing to substantially advance any legitimate state interest while at the same time destroying the Lais investment. The district court concluded that the ordinance was not based on community planning, and found: "The only objective of the Ordinance [4488] was to delineate and acquire a "view corridor" over several neighboring properties, the cost and damages from which were to be borne by the individual owners.", Appendix C, at p 20a, CL 5, and that "No property in the subject area was more burdened by the public acquisition of the view corridor than Plaintiffs', and many properties in close proximity suffered no deprivation at all. Appendix C, at p 20a, CL 6. The trial court specifically found that "The establishment of a specifically designated view corridor by Defendant CITY is akin to those historical cases where the public entity took a recognized interest in real property." Appendix C, at p 20a, CL 1.

The trial court, after its exhaustive review of the facts, concluded that "The enactment of Ordinance 4488 provided windfalls to neighboring properties and failed to produce the 'average reciprocity of advantage of zoning restrictions" which provide the constitutional basis for the exercise of the police powers in zoning cases." Appendix C, at p. 20a, CL 7. Judge King rejected any alleged planning or police power arguments raised by the City, holding that the City's actions actually intended to occupy and acquire the air space rather than merely restricting construction, reaching the legal conclusion "In the instant case the legislative history requires a finding that Defendant CITY really intended to acquire a public right to use the air space/view corridor over the subject properties to the total exclusion of any use by Plaintiffs." Appendix C, at p. 21a, CL 11. Judge King was to treat the case as a taking because of the nature of the City's actions being a appropriation and occupations in addition to the financial destruction of the Lais; he ruled "Plaintiffs have demonstrated to this Court the type of governmental activity in the instant case is conceptually identical to governmental activity which takes only a portion of the fee interest in a citizen's land, such as a lease for a term of years, a sewer easement, or a servitude for the overflow of waters." Appendix C, at p 21a, CL 12.

Judge King's conclusions of law continued to delineate the oppressive, invasive, and appropriative aspects of the Ordinance 4488 which caused him to find a taking, all of which were ignored by the Ninth Circuit panel. Judge King ruled "It is the nature of the intrusion into the Plaintiffs' exercise of their property's uses, and not the amount of demonstrable damage flowing therefrom, that the Court examine to determine whether a taking has occurred," Appendix C, at p 22a, CL 16. Conclusions of Law 17 through 28, Appendix C at 22a-24a, clearly demonsrate that Judge King found a taking under every constitutional test enunciated by this Court in both regulatory taking and physical occupation cases. Judge King's Conclusion of Law 28 found the requisite economic wipeout of the Lais had been proved when he held "All reasonable use and return on investment has been denied in this case", Appendix C, at p 24a, thus establishing a regulatory taking. He also found an appropria-

tion of property for public use based on the Lais facial challenge to the ordinances in Conclusion of Law 29 when he ruled "The actions of Defendant CITY are such that this Court need not reach the issue of what economic criteria are to be utilized by courts in determining the extent of inteference necessary to constitute a taking, as the nature and quality of conduct by Defendant CITY indicates that a taking *per se* was effected and the challenged ordinances arbitrarily and capriciously discriminate against Plaintiffs and persons similarly situated and in favor of other in the same local who will reap windfall benefits and profits. Appendix C, at p 24a. Finally, based on his other factual and legal conclusions, Judge King found the City to have also violated the Lais' right to Due Process of Law, Just Compensation, and the Equal Protection of the Law, all in violation of 42 U.S.C. §§ 1983 *et. seq.* Appendix C, at p 24a, CL 30.

C. The Legal Proceedings Below.

In September, 1978, the Lais filed a complaint against the City in the United States District Court for the District of Hawaii, alleging that the actions of the City in adopting and enforcing a purported Special Design District in the Punchbowl area of Honolulu, and denying a Certificate of Appropriateness thereunder, had taken their development leasehold interest in property, in violation of the Fifth and Fourteenth Amendments of the United States Constitution, 42 U.S.C. § 1983, and Article I, § 5 and 20 of the Hawaii Constitution.

The parties initially litigated the case by way of the City's successive motions for summary judgment on various issues, all of which were denied as being without merit. Several of these motions raised the City's contentions that the Lais had not exhausted "administrative remedies", but the City did not question the ripeness of the litigation through any claim that its denial of a Certificate of Appropriateness was not a final action and could be challenged by the Lais by a variance procedure. In light of the number of issues raised to prevent a trial on the merits, the failure of the City to raise the variance issue at that time is substantial evidence that such a procedure does not exist except as a legal fiction.

Trial was held before Senior Judge Samuel P. King on

November 3, 1982, at which trial the City called no witnesses. Both parties submitted memoranda at the request of the trial court, and the trial court directed the Lais to circulate draft Findings of Fact and Conclusions of Law finding a taking of property without compensation, which prompted the City to file a Supplemental Post Trial Memorandum seeking dismissal of the case on statute of limitations grounds. Subsequently, the trial court dismissed this case as barred by the statute of limitations. *Lai v. City & County of Honolulu*, 562 F.Supp 903 (D. Haw. 1983), *on reh'g, Lai V. City & County of Honolulu*, 575 F.Supp. 1510 (D. Haw. 1983).

The Lais appealed to the Ninth Circuit the prior (successful) post trial claims which resulted in the dismissal of the case, and the Circuit Court unanimously overruled the specious statute of limitations arguments raised following the trial, remanding the case for further proceedings in the District Court. *Lai v. City & County of Honolulu*, 749 F.2d 588 (9th Cir. 1984).

Following the remand, Senior District Judge King entered his decision holding "the City and County of Honolulu by its Ordinances 4488 and 78-89 and actions thereunder have taken Plaintiffs property without just compensation," and ordered the Lais to submit new proposed findings while allowing the City to "file any objections to or modifications of Plaintiffs' proposals." Appendix D, at pp 26a-27a. Judge King's decision by offering both parties the opportunity to raise legal and factual issues which may have become significant during the post-trial and appeal period, by providing in his decision that "In the event that either party believes that there have been significant and relevant changes in the facts or law since this matter was submitted after trial, a motion to reopen will be considered. Such a motion must be supported by a detailed statement of any additional evidence sought to be introduced and a specific reference to any changes in statutory or case law." Appendix D, at p 27a.

The City failed to raise any *Williamson* issues in response to that decision, and failed to object below to the entry of the Findings of Fact and Conclusions of Law relating to administrative exhaustion and the finality of the City's denial of the Certificate of Appropriateness. As a result and following a hearing, the Findings

of Fact and Conclusions of Law on Remand (Appendix C) were entered, and subsequently a judgment was entered following the award of attorneys fees to the Lais. The City's appeal followed.

D. The Ninth Circuit's Dismissal.

The City's appeal did not challenge the lower court's findings, but asserted for the first time that Lai's claims were not ripe under *Williamson*, and argued that the Lais should have sought a variance from the Zoning Board of Appeals, pursuant to RCH. Section 6-909. The Lais contested whether, on its face, this provision even applied to actions taken by the City Council as opposed to action taken by the Director of Land Utilization, as the denial of the Certificate of Appropriateness constituted the last remedy available from the quasi-administrative body. The City Council had enacted the ordinances as a legislative act, reserving only unto itself the power to grant exceptions for significant projects.

The Ninth Circuit panel opinion purports to review the trial court findings, but failed to do so accurately or fairly; this *dicta* in its opinion is actually more lengthy (and contains more errors) than does its actual holding. The holding itself was not based on any evidence in the record but instead on a misperception of the evidence and statements of counsel at oral argument. The panel adopted without reasoning the buzzword "variance" and misconstrued the Lais evidence that others had been allowed to build without complying with the challenged ordinance. The panel decision incorrectly holds and states that "Since both sides have pointed out to us on appeal that other exceptions to the ordinance's height restriction have been granted during the long course of this litigation, we must conclude that the Lais 'have not obtained a final and authoritative determination of the type and intensity of development legally permitted on the subject property.'" Appendix A, at p. 5a. The panel totally misinterpreted this statement, just as it had ignored and misinterpreted Judge King's detailed findings when it blithely stated "The facts established at trial, as found by the district court, showed only that a scenic easement had diminished the value of the plaintiffs' property." Appendix A, at p 4a.

The Lais introduced evidence of favorable treatment and non-application of the ordinances to other similarly-situated developments only to demonstrate the arbitrary and capricious nature of Defendant City's actions, as the record is totally devoid of any applicant receiving a Certificate of Appropriateness or a variance at any time. Thus, if other projects were allowed to proceed without application of the restrictions applied to the Lais, it is circumstantial evidence corruption among the members of the Honolulu City Council, not faithful application of the Just Compensation clause. The Ninth Circuit panel construed circumstancial evidence that City Council members had turned their offices into profit centers to the detriment of planning as evidence of the availability of a variance, as nothing else in the record was cited to justify the belief that a variance was an available procedure.

The Ninth Circuit Panel also incorrectly construed the basis for Judge King's finding of a taking; it stated "The [Petitioners Lai] also asserted alternative theories [other than just compensation] for compensation or equitable relief", Appendix A, at p.4a, but later stated "Plaintiffs in this case also alleged alternative "taking" theories which the district court did not reach." Appendix A, at p. 4a. These statements raise serious questions as to whether the Ninth Circuit panel even read Judge King's detailed findings, which: (a) did conclude that a taking occurred regardless of economic damages, and; (b) did find the City liable for Due Process/Equal Protection violations of the Lais' rights. See Appendix C, at pp 22a-25a. The panel obviously committed grave error in stating that "The facts established at trial, as found by the district court, found only that a scenic easement had dimished the value of the plaintiff's property." Appendix A, at p 4a.

Similarly, the Circuit Court panel made a grave error of stating "The district court found that the Lais could build a 51-unit residential development on the property which would confrom to the zoning requirements and restrictions." Appendix A, at 4a. While the Lais submitted evidence that such a development could be achieved within the restrictions, Appendix C, at 13a, FF 12, the purpose of that evidence was to demonsrate that even the largest possible structure under the new restrictions was uneconomical, and

thus that any new construction was totally prevented by the impact of the regulations. Appendix C, at p 13a-14a. Again, the erroneous statements of the Ninth Circuit opinion cast doubt on the quality and accuracy of its review of the judgment below.

REASONS FOR GRANTING THE WRIT

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I.

THE NINTH CIRCUIT IMPROPERLY ENTERED JURISDICTIONAL FACTUAL FINDINGS REVERSING THE LAIS' MONEY JUDGMENT AND DISMISSING THIS LITIGATION RATHER THEN REQUIRING RESPONDENT CITY TO FIRST SUBMIT ITS BELATED AND ILLUSORY ADMINISTRATIVE FINALITY ARGUMENTS TO THE DISTRICT COURT.

The District Court correctly ruled that the Lais had obtained a final decision respecting the application of the challenged regulations to their property from the only responsible governmental entity, which the Honolulu City Council, prior to filing suit. Although the Ninth Circuit panel chose to ignore the trial court's findings on this issue, those findings were unchallenged in the trial court and on appeal. The panel decision also misapplied the law of ripeness, as failed to recognize the multiple bases for the trial court decision, including Due Process of Law, Equal Protection of Law, and appropriation of private property; each of these findings below were based on the Lais facial challenge to the ill-advised ordinances, and were not subject to the "ripeness" requirements.

Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172, 194, 105 S.Ct. 3108, 3121, 87 L.Ed.2d 126, 144 (1985)("*Williamson*"), requires federal dismissal under the ripeness test only where there is not final decision under state law of the impact and application of the regulations; the only requirement it imposed on litigants before

proceeding in federal court is the requirement that the "government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." In applying *Williamson* to the facts herein, the panel ignored both the numerous trial court findings of exhaustion and finality, but also the independent basis for the judgment due to the Lais' successful facial challenge to the ordinances. No such exhaustion requirements exists where there is no application of the statute to be made, such as where the invalidity of the restrictions cannot be interpreted away.

Petitioners Lai contended then and now that the denial of a Certificate of Appropriatness by the Honolulu City Council, based on the specific and singular finding that the proposed development violated the height limitations of Ordinance 4488, was the last remedy available to them short of this litigation, as the combination of charters, ordinances, and zoning procedures which the City utilized to dazzle the Ninth Circuit panel are simply not available to the Lais due to the unique nature of special design districts within the City and County of Honolulu.

The misrepresentations, conjecture, and last ditch tactics by which the City misinformed the Ninth Circuit could not have succeeded at trial or on remand, but the Ninth Circuit has, by remanding for dismissal only, denied the Lais a hearing to determine whether the variance process cited on appeal by the City was an available procedure to contest the applicability of the challenged ordinances. The result is a legalistic Catch 22; if the Lais proceed to seek a variance, and the same is denied not on the merits but due to unavailability, this case is permanently dismissed and the applicable statute of limitations has long since expired for this thirteen year old depirivation of property. This scenario is exactly what the Lais expect to occur if they are not at least given a hearing on remand to demonstrate that no such variance procedure is available.

There exists no reason to believe that the variance procedure could be used to litigate the taking question presented herein, particularly the facial challenge to the ordinance itself, under any

conceivable application of Section 6-609 of the Revised Charter of the City and County of Honolulu 1973 (1984 Ed.). Appendix F, at p. 38a. This untested and doubtful variance procedure must be viewed in light of the availability of Hawaii Judicial remedies should the variance be denied. The lack of any Hawaii judicial remedy for inverse condemnation does not encourage the development of a meaningful administrative remedy for takings claims. The land use history and jurisprudence of the State of Hawaii demonstrates the lack of judicial remedies accorded property owners adversely impacted by ordinances seeking to take private property for public use. Indeed, the Hawaii Supreme Court's most recent refusal to recognize state taking liability has led to an extraordinary conflict between it and the federal courts attempting to enforce the Fifth Amendment, with the United States District Court concluding that the state court:

> cut off and shut off each and every attempt on the part of plaintiffs' attorneys to argue the constitutional problems . . . when one reads the court's interpretation of what occurred . . . one can only conclude that . . . [its] statements were deliberately and grossly misleading (and if presented in the federal courts, would *mandate* F.R. Civ. P. Rule 11 sanctions). It was only in this federal court that the plaintiffs had a full and uncircumscribed opportunity to raise the constitutional questions.

Robinson v. Ariyoshi, 676 F. Supp. 1002, 1018, (D. Haw. 1987)(emphasis in original).

The Hawaii Supreme Court's stance is radically unreceptive to compensatory remedies, and goes far beyond even the position of the California Supreme Court in *Agins v. City of Tiburon*, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *prob. juris. noted*, 444 U.S. 1011, 100 S.Ct. 658, 62 L.Ed.2d 639, *aff'd*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980). Hawaii Courts are said to have no authority to award damages for *any* taking whatsoever, other than in formal condemnation proceedings, because Hawaii has not

statutorily waived its immunity to damage suits. Only injuntive relief is available. *See Robinson v. Ariyoshi*, 65 Haw. 641, 658 P.2d 287 (1982), *reconsideration denied*, 66 Haw. 528, 726 P.2d 1133 (1983)("Robinson").

Further, the Hawaii Supreme Court has been found by the federal court not merely to have denied compensatory relief, but to have framed its answers to the Ninth Circuit on the subject "by misdirection, misinformation, misapplication, and misconstruction" so as to avoid the taking implications of its own decision. *See Robinson v. Ariyoshi*, 676 F. Supp. at 1019. Despite this judicial record, the City herein raised arguments for the first time before the Ninth Circuit arguing that Petitioners Lai ignored both administrative and judicial remedies available to it under Hawaii law. No rational reason exists to believe that the variance procedure the City argued before the Ninth Circuit panel was anything more than a desperate ninth inning attempt at a grand slam after all other methods of victory had failed.

If in fact such a remedy exists in reality, it could and should have been argued during the numerous motions by the City for summary judgment before trial. The fact that the City argued several other exhaustion issues below without raising the variance issue is itself circumstantial evidence even the City did not then believe that such a remedy existed. In addition, if such a remedy existed, Hawaii law regarding administrative rules required the City to adopt and publish rules of practice setting forth the procedure, practice requirements, law, policy, and statements of policy. See, Chapter 91 H.R.S.. The noticable absence of any presentation of such documents to the lower courts again circumstantially proves that no such procedures exist.

Ordinance 4488 imposed for the first time in mid 1975 the requirement of a Certificate of Appropriateness; this Document could only be issued by the City Council itself, with only planning participation by any planning officials. Appendix E, at pp 28a-38a. This direct and sole City Council authority of planning over the issuance of the Certificate for anything other than minor repairs was

mandated by the basic zoning code's general requirements for Historical, Cultural, and Scenic Districts (H.C.S.). See C.Z.C. § 21-1205, Appendix G, at pp 39a-41a. The implementation of Ordinance 4488, purporting to be such a district, required such a procedure. Ordinance 4488 purported to authorize the City Council, in considering an application for the Certificate, to exceed the height limits of 4488 (but not the underlying zoning) for either minor rooftop amenities such as "...flagpoles, putting shuffleboard courts, and putting greens", but restricted Council discretion to grant height limits for other purposes.

Only the council was authorized to grant such relief by way of Certificate of Appropriateness, pursuant to the procedures contained in § 21-1205, Appendix G, at p. 40a, but restricted this discretion with the Catch 22 provision contained in § 5(A)(2)(b) of the Ordinance 4488 that it could do so only by "setting forth findings of fact that the proposed construction would not diminish any existing public views of Punchbowl from the view corridor defined by the district boundary, or is necessary to achieve some public objective of relatively equal or greater importance than listed herein." Whatever this section may mean, it highly restricts the authority of the Council to grant exceptions, and by such restriction overrules the applicability of a variance procedure to obtain such relief, even if such a procedure might exist for other H.C.S. districts.

The specific height limit alteration process the Council included in Ordinance 4488, reserving unto itself such powers, belies the City's specious arguments that the Zoning Board of Appeals, as an administrative agency, was authorized to exercise similar powers. Article 12 of the C.Z.C., encompassing H.C.S. districts, contains § 21-1206 to govern internal conflicts; in the event of a conflict between any provision an H.C.S. district ordinance and any "regulations" of the underlying zoning district, "the more restrictive provisions shall apply." Appendix H, at p. 42a. The restrictions contained in Ordinance 4488 regarding alteration of height limits are clearly more restrictive (but equally inapplicable) C.Z.C. variance procedures, and would thus be controlling.

Even if § 6-909 R.C.H. is deemed to supersede the provisions contained in the C.Z.C., by its own language it incorporates standards based on the underlying zoning to determine the availability of a variance; where, as herein, the underlying zoning includes a H.C.S. district and its restrictions, the provisions of § 6-909(b) do not authorize an alteration in height limits even if all three requirements are met. This issue need not be decided, because even if the Lais had sought such a variance, they do not meet the criteria of §§ 6-909(b)(2) or (b)(3). Appendix F, at p 38a. The City speaks with forked tongue when it claimed that a variance was available in federal court, but strictly interprets the charter when one is actually sought. The City would certainly claim that the Lais' project would not deserve an variance because their height restrictions are "general conditions of the neighborhood" and the use (height) sought is contrary to the "general intent and purpose of the zoning ordinance.

The Certificate could only be issued if the proposed project complied with the requirements of Ordinance 4488, which rendered the Lais development (then seeking a building permit) unable to obtain one. The Lais complied with the application requirements, but the manner in which they were denied their Certificate demonstrates the futility of this process. The Ninth Circuit panel both ignored and misrepresented the trial court's factual findings regarding the processing of the Lais' application for a Certificate of Appropriateness; the facts the Lais established at trial (as opposed to the boilerplate claims contained in the City's planning documents) clearly demonstrate the single criteria of height as being the sole factor.

The sophistic reasoning by the City, totally without case authority, belies any validity of its arguments. Had the issue been presented to the trial court, and the Lais given the opportunity to elicit testimony from the appropriate officials of the City, they could have proven to Judge King (familiar with Hawaii law) that no such variance procedures existed (assuming Judge King needs any convincing on such a frivolous claim). The Ninth Circuit, by concluding that the variance procedure existed, errored greviously; Petitioners LAI are prepared, if need be, to prove the lack of remedy,

but are prevented from doing so by the dismissal of the case. If this Court does not simply reinstate the judgment, then it should remand with directions to allow the Lais such a hearing.

II

THE FIRST PRONG OF *WILLIAMSON* IS INAPPLICABLE TO THE LAIS' JUDGMENT, AS THE JUDGMENT IS BASED ON TRIAL COURT FINDINGS ESTABLISHING THE NON-REGULATORY NATURE OF THE TAKING, THE FACIAL INVALIDITY OF THE REGULATIONS, THE DUE PROCESS VIOLATION, AND THE EQUAL PROTECTIONS VIOLATION.

The Ninth Circuit's dismissal of a non-regulatory, inverse condemnation action erroneously extended *Williamson* to all non-regulatory and oppressive taking cases. An "oppressive" taking may occur without physical invasion where, for example, "a public entity acting in furtherance of a public project and substantially interferes with property rights and thereby significantly impairs the value of property . . . ." *Richmond Elks Hall Association v. Richmond Redevelopment Agency* 561 F.2d 1327, 1330 (9th Cir. 1977). Judge King's findings following the trial clearly found that the challenged ordinances were arbitrary, capricious, appropriative, and did not substantially advance any ture planning purpose.

Thus, the cases of *Williamson* 473 U.S. at 185, 105 S.Ct. at 3116, 87 L.Ed.2d at 138, and *MacDonald,* 477 U.S. at 351, 106 S.Ct. at 2567, 91 L.Ed.2d at 296, required exhaustion of available state remedies for takings of private property "by application of government regulations". However, the Ninth Circuit and others have correctly excluded "physical takings" from the application of *Williamson See, e.g. Hall v. City of Santa Barbara,* 813 F.2d 198 (9th Cir. 1986) Similarly, non-regulatory "oppressive conduct" takings do not suffer from the regulatory uncertainty addressed in *"Williamson Martino v. Santa Clara Valley Water District,* 703 F.2d 1141 (9th Cir. 1983), *cert. denied,* 464 U.S. 847, 104 S.Ct. 151, 78 L.Ed.2d 141 (1983);

Williamson applied only to *regulatory* takings because, first, the local processes relating to special permits, variances and

the like must be exhausted before the Courts can determine what the real money damages are and, second, because use and occupancy of the property were not denied to plaintiff. In fact, a Hawaii landowner's claim based on "oppressive conduct" taking by the City has specifically been allowed to go foward in *Kaiser Development Co. v. City and County of Honolulu*, 649 F. Supp. 926, 943 (D. Haw. 1986)(despite dismissal of the concomitant "regulatory" claims under *Williamson*. Clearly the City's denial of all economic use of Lais' property by oppressive means constituted a permanent, non-regulatory taking. The Ninth Circuit's dismissal therefore improperly and unnecessarily extended *Williamson* to a broad class of non-regulatory taking cases.

More fundamentally, this case involved oppressive conduct completely unrelated to any "land use regulation." The trial court's findings clearly discredited any claim that these regulations were the result of planning or somehow furthered a planning interest. The City simply wanted something for nothing, and has avoided paying for its taking for 13 years. This conduct was wrongful and oppressive and was found at trial to work a taking. No "regulation of use" was at issue, and there was no nexus between the City's conduct and its true purpose.

> Whatever may be the outer limits of "legitimate state interests" in the takings and land use context, this is not one of them. In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but "an out-and-out plan of extortion."

Nollan v. California Coastal Commission, ___ U.S. ___, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987) (citing J.E.D. Associates, Inc. v. Atkinson, 121 N.H. 581, 584, 432 A.2d 12, 14-15 (1981)). See also *Gordon v. City of Warren*, 579 F.2d 386 (6th Cir. 1978).

III

THE CIRCUIT COURT DEPARTED FROM THE ACCEPTED COURSE OF JUDICAL PROCEDURES IN FAILING TO REVIEW THE TRIAL COURT'S FINDINGS FOR ERROR RATHER THAN BASING ITS OPINION ON ITS OWN HIGHLY INACCURATE REVIEW OF EVIDENCE PREVIOUSLY REJECTED BY THE TRIAL COURT.

Petitioners Lai have provided this Court with a detailed analysis of the divergence between the findings of Judge King of the District of Hawaii, and the purported findings of Circuit Judge Schroeder speaking for the Ninth Circuit panel. The complexity of this case does not excuse the failure of the panel, before reversing the money judgment the Lais obtained after years of litigation and a prior appeal, to correctly review the findings of Judge King.

Had the panel opinion, Appendix A hereto, simply made a few innocuous errors of little import, no use of this Court's supervisory powers would be required or allowed; its decision herein contains numerous errors of fact in addition to misconstruing this Court's decision in *Nollan v. California Coastal Commission*, ___ U.S. ___, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987). The panel decision cited *Nollan* for the proposition:

> In its most recent pronouncement of last term, the Supreme Court expressly stated that a height limitation preserving the public's scenic view is not a "taking.

Nollan v. California Coastal Commission, ___ U.S. at ____ , 107 S.Ct. at 3147-48. Appendix A, at p 4a. Not only does this analysis ignore the very limited language utilized by the Supreme Court, it demonstrates that the Ninth Circuit panel was charting its own course in takings cases at variance to the other panels of that circuit, and at variance with the precedent of this Court. This rough justice and treatment of the Lais, by a panel which lacked the trial court's knowledge of the physical appearance of the Punchbowl area, has

resulted in the the comparison of the apples and oranges of the "takings" law to the detriment of litigants in this Circuit. The actual language utilized by this Court in *Nollan* was:

> The commission argues that among these permissible purposes are protecting the public's ability to see the beach, overcoming the "psychological barrier" to using the beach created by a developed shoreline, and preventing congestion on public beaches. We assume, without deciding, that this is so-in which case the Commission unquestionably would be able to deny the Nollans their permit outright if their new home (alone, or by reason of the cumulative impact produced in conjunction with other construction) would substantially impede these purposes, unless the denial would interfere so drastically with the Nollans' use of their property as to constitute a taking. See *Penn Central Transportation Company v. New York City, supra.*

__ U.S. at ____, 107 S.Ct. at 3147 (footnote omitted). The subsequent language (presumably the basis for the rather vague reference in the panel decision) observes:

> Thus, if the Commission attached to the permit come condition that would have protected the public's ability to see the beach, notwithstanding construction of the new house-for example, a height limitation, a width requirement, or a ban on fences-so long as the commission could have exercised its police power (as we have assumed it could) to forbid construction of the house altogether, imposition of the condition would also be constitutional.

___ U.S. ___ , 107 S.Ct. 3141-3148.

While this language may give rise to the far-fetched interpretation and reading of the panel, it does not justify such a

conclusion. The decision reflects that this Court was highly divided, and the language read by the Ninth Circuit panel was taken completely out of context. The actual language of this Court's opinion continued in footnote 4 to recognize:

> If the Nollans were being singled out to bear the burden of California's attempt to remedy these problems, although they had not contributed to it more than the other coastal landowners, the State's actions, even if otherwise valid, might violate either the Takings Clause or the Equal Protection Clause. One of principle purposes of the Takings Clause is "to bar government from forcing some people to bear public burdens which, in all fairness, should be borne by the public as a whole," *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960); see also *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 656; 101 S.Ct. 1287, 1306, 67 L.Ed.2d 551 (1981)(BRENNAN, J. dissenting); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 123, 98 S.Ct. 2646, 2658, 57 L.Ed.2d 631 (1978). But that is not the basis of the Nollans' challenge here.

___ U.S. at ___, 107 S.Ct. at 3147, n. 4. As this Court can see, Judge King's findings anticipated this Court's decision in *Nollan*, while the panel decision ignored the arbitrariness issue totally.

The Ninth Circuit panel decision seeks to protect open space and the environment, it has taken an improper and unjudicious tack in dismissing the Lais judgment on faulty reasoning and deliberate misconstruction of both the law and the facts.

While the judgment in favor of the Lais appears to be a first in federal jurisprudence, other courts and legislative bodies have long recognized what the Ninth Circuit panel did not. While environmental protection is an important goal, the courts have consistently held that such laudible goals are not to be confused with

just compensation. In numerous other cases and statutes dealing with scenic easements, the universal black letter law has been directly opposite of that taken by the panel.

The concept of a "scenic easement" is nothing new and unique, and the law related thereto was well established prior to the enactment of Ordinance 4488. Case law in state and federal courts, along with statutory law: (a) recognized a scenic easement as a specific property interest; (b) provided for taking by condemnation of such an interest in land amounting to less then a fee interest, and; (c) provided for recognition of and condemnation of such an interest in land.

The United States Code is replete with provisions relating to the creation, use, and purchase of scenic easements; Congress has enacted a series of enabling acts from 1954 to the present to create and fund scenic easements appurtenant to national parks and other recreational resources, yet at no point did the United States ever consider that it could simply declare such an easement to exist pursuant to its police powers. See 16 U.S.C. §§ 204, 251j, 281b, 410ff-1, 441k, 441kk-1, 460a-6, 460m-1, 460o-1, 460q-1, 460x-11, 460aa-2, 460bb-2, 460ff-1, 460gg-6, 460jj-1, 460kk, 1277, and 1286. In each instance where the federal government has sought such interests in land, the preservation goals were at least as important as the stated goals of the City herein, yet Congress never sought a short cut to obtaining such interests by eliminating just compensation provisions.

The Wild and Scenic Rivers Act, 16 U.S.C. Section 1286, defined "scenic easement" as:

> (c) "Scenic easement" means the right to control the use of land (including the air space above such land) within the authorized boundaries of a component of the wild and scenic rivers system, for the purpose of protecting the natural qualities of a designated wild, scenic, or recreational river area, but such control shall not affect, without the owner's consent, any regular use exercised prior to the aquisition of the

> easement. (Pub.L. 90-542, § 16, formerly § 15, Oct. 2, 1968, 82 Stat. 918; Pub.L. 93-279, § 1(c), May 10, 1974, 88 Stat. 123, renumbered Pub.L. 96-487, Title VI, § 606(a), Dec. 2, 1980, 94 Stat. 2416).

One cannot presume that the United States would enact just compensation provisions over the last thirty-three years if the Just Compensation clause allowed the government to achieve such desirable ends through the more expedient course of police power regulation; such an attempted exercise of regulatory powers constitutes a prohibited appropriation for public use.

The experience of the United States Attorney General attempting to preserve open space surrounding the nation's capitol was soundly rejected when tried in 1979; in *United States v. County Board of Arlington*, 487 F.Supp. 137 (E.D. Va. Alexandria Div. 1979), the United States argued that tall buildings near the capitol icons could be abated as a nuisance was soundly rejected. The Court reasoned, anticipating this Court's decision in *Nollan v. California Coastal Commission*, ___ U.S.__, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987):

> The imposition of general restrictions on the height of buildings for the safety and convenience of the public is a valid exercise of the police power; but in some instances the erection of high buildings or other ugly objects has been prohibited so that a park or a beautiful public building would not be disfigured by the proximity of such structures.
>
> To sustain such an interference with the use of private land without compensation has been farther than the courts have been willing to go. When, however, compensation is provided, such restrictions may be looked upon as easements, created by statute for the benefit of the land on which the park or public building lies, and which haved been taken by the public by eminent domain. See 2A J. Sackman, Nichol's, The Law of Eminent

> Domain, Section 7.516[1] at 7-239 (rev. 3d ed. 1976).

487 F.Supp. at 143. The specific and limited applicability of Ordinances 4488 and 78-89 require similar compensation.

Scenic easement issue has also arisin in highway contexts, always with the requirement of just compensation. In *Hardesty v. State Roads Commission*, 276 Md. 25, 343 A.2d 884 (1975), the state agency court discussed the state liability for condeming and then abandoning a scenic easement. The Court observed:

> The concept of a scenic easement according to *Kamrowski v. State*, 31 Wis.2d 256, 263, 142 N.W.3d 793, 796 (1966) "springs from the idea that there is enjoyment and recreation for the travelling public in viewing a relatively unspoiled natual landscape..." On federal statute defines a scenic easement as " the right to control the use of land...for the purpose of protecting the scenic view. . .but such control shall not affect, without the owners consent, any regular use exercised prior to the acquisition of the easement." 16 U.S.C.A. § 1286(c)(1970). A scenic easement has otherwise been characterized as a negative easement or servitude precluding the owner of land from doing an act which, if no easement existed, he would be entitled to do:
>
> "Negative easements involve the payment to the landowner for a termination or extinguishment of a portion of his property rights. Scenic easements are an example: the landowner is paid by the state to terminate his right to erect structures or buildings or otherwise use his land so as to destroy the view from the highway. The state obtains no rights to enter upon the land, either for its departments for the public at large. The state obtains only the right to enforce the negative easement through court action." Comment, *Progress and Problems in Wisconsin's Scenic and Conservation Easement Program*,

1965 Wis. L. Rev. 352, 360 (1965).

276 Md. at ___, 343 A.2d at 887. No closer parallel to the instant taking can be found, and the compensatin for the scenic easement taken from the Lais cannot be justified as a police power regulation. The Ninth Circuit panel, marching to the beat of a different drum, must be reigned in by this Court's use of its supervisory and review powers.

IV

THE NINTH CIRCUIT ERRED BY NOT (1) REMANDING TO THE DISTRICT COURT TO FIND JURISDICTIONAL FACTS OR (2) SENDING CERTIFIED QUESTIONS TO THE HAWAII SUPREME COURT

The Ninth Circuit plainly erred by not remanding the case to the lower court for jurisdiction findings or certifying questions to the Hawaii Supreme Court. This panel conflicted with another panel decision in *Norco*, 801 F.2d at 1146, which held that the adequacy of state remedies is to be decided by the district court.

Here, the Circuit Court inexplicably determined "jurisdictional facts" which are seriously in conflict with the District Court's factual findings that: (1) the purpose of the taking and the oppressive conduct was to cause acquisition of the Lais' land/air space for a scenic easement; and (2) given that purpose, seeking a variance would have been a useless gesture. Indeed, if the Ninth Circuit court believed that a real question as to Hawaii law existed, it should have certified the question to the Hawaii Supreme Court before ruling. Without so doing, the Court sends Lais back to the vagaries of the State court with sovereign immunity bars, uncertain statutes of limitation and other barriers, after the case has already been tried and won on the merits. The Ninth Circuit's decision has created irreconcilable conflicts among the many cases in this area, which now can only be resolved by this Court.

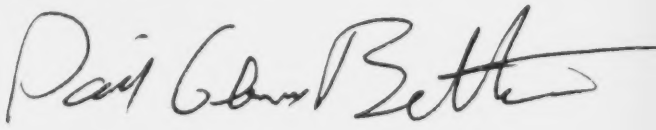
V

CONCLUSION

The Ninth Circuit's decision creates an untenable state of confusion and inconsistency for landowners faced with the "Hobson's Choice" of pursuing unavailable State finality remedies or uncertain federal remedies, with the possibility in either case of allowing the statute of limitations to destroy any possible remedy depending on the erratic application of *Williamson* standards by the federal courts. No landowner may rest secure while so roving a commission such as the Ninth Circuit is at large.

Federal Courts should not distort *Williamson* so as to deny federal constitutional protections to those who otherwise have clearly obtained a final judgment based on a multitude of grounds. To correct the excess and error of the decision below, this Court should GRANT this Petition for Writ of Certiorari.

Respectfully submitted,



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APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CLIFFORD Y.C. LAI
and VICTORIA L. LAI,

Plaintiffs-Appellees,

v.

CITY AND COUNTY
OF HONOLULU, a
municipal corporation,

Defendant-Appellant..

No. 87-1689

D.C. No.
CV-78-0355-SPK

OPINION

Appeal from the United States District Court
for the District of Hawaii
Samuel P. King, District Judge, Presiding

Argued and Submitted
January 15, 1988-San Francisco, California

Filed March 7, 1988

Before: Otto R. Skopil, Jr. and Mary M. Schroeder, and
Ruggero J. Aldisert, * Circuit Judges.
Opinion by Judge Schroeder

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* Honorable Ruggero J. Aldisert, Senior U.S. Circuit Judge for the Third Circuit, sitting by designation.

SUMMARY

Constitutional Law

Appeal from judgment finding a scenic easement ordinance a taking. Reversed and vacated.

The court held that appellees' claim is not ripe for failure to seek variance of scenic easement ordinance.

In 1971, appellants the Lais purchased their interest in a lot located near the Punchbowl Crater. In 1974, the Lais entered into an arrangement with a developer, who planned to build condominiums in conformarce with the then existing zone height limit. In 1975, appellant City of Honolulu enacted an ordinance establishing a scenic easement to protect one view of the Crater. The ordinance therefore restricted construction height. In 1976, the Lais's developer applied for, but was denied a Certificate of Appropriateness to build. The Lais sued, challenging the scenic easement imposed upon their property as a taking without just compensation.

[1] A height limitation preserving the public's scenic view is not a taking. [2] As to the merits of appellees' other taking theories, they must pursue all avenues of relief before presenting a taking claim in feceral court.

COUNSEL

Ronald B. Mun, Honolulu, Hawaii, for the defendant-appellant.

David Bettencourt, Honolulu, Hawaii, for the plaintiffs-appellees.

OPINION

SCHROEDER, Circuit Judge:

The City and County of Honolulu appeal the district court's money judgment in favor of the Lais in an inverse condemnation action. In 1975, the City enacted a zoning ordinance, placing restrictions within a designated area on construction more than twenty-five feet about ground level. The purpose was to protect the view of the Punchbowl Crater from the H-1 Freeway. The Lais, owners of a development lease, were denied a Certificate of Appropriateness for their proposed high-rise condominiums due to the zoning ordinance. The Lais sued the City, contending that the ordinance constituted a compensable "taking" of their property, and won a judgment in their favor in the district court. We reverse and remand to the district court with instructions to dismiss because the plaintiffs have no "taking" claim which is yet ripe.

In 1971, the Lais purchased their leasehold interest in a 30,000 square foot lot with rental units in Honolulu. The property is located near the Punchbowl Crater, a historic and scenic attraction. In 1974, the Lais entered into an arrangement with a developer, who planned to build condominium apartments in conformance with the existing zoning height limitation of 350 feet.

In 1975, the City of Honolulu enacted Ordinance Number 4488, establishing the Punchbowl District as Historic, Cultural and Scenic District Number 3. The City's express purpose in enacting the ordinance was to establish a scenic easement to protect one view of the Punchbowl Crater from the H-1 Freeway. The ordinance therefore restricted construction more than twenty-five feet above ground level.

In 1976, the Lais' developer requested a Certificate of Appropriateness from the Honolulu City Council to build its condominium apartments. The City Council voted to deny the developer's application, citing eight considerations including the proposed project's height.

On September 14, 1978, the Lais sued the City and County of Honolulu under the Civil Rights Act of 1871, 42 U.S.C. § 1983, challenging the scenic easement imposed upon their property as a "taking" without just compensation and seeking damages. They also asserted alternative theories for compensation or equitable relief.

[1] The facts established at trial, as found by the district court, showed only that a scenic easement had dimished the value of the plaintiffs' property. However, the Supreme Court has specifically stated that its decisions sustaining land-use regulations that "are reasonably related to the promotion of the general welfare, uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking' ". *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 131, 98 S.Ct. 2646, 2662-63 (1978). The district court found that the Lais could build a 51-unit residential development on the property that would conform to the zoning requirements and restrictions. The inability to reap as great a profit as one might have absent the zoning restriction, does not equate with a "taking". *William C. Haas & Co. v. City and County of San Francisco*, 605 F.2d 1117, 1120-21 (9th Cir. 1979), *cert. denied,* 445 U.S. 928, 100 S.Ct. 1315 (1980). In its most recent pronouncement of last Term, the Supreme Court expressly stated that a height limitation preserving the public's scenic view is not a "taking." *Nollan v. California Coastal Commission*, 107 S.Ct. 3141, 3147-48 (1987). Plaintiffs in this case also alleged alternative "taking" theories which the district court did not reach.

[2] We cannot rule definitively on the merits of any of plaintiffs' theories, however, because the plaintiffs must pursue all avenues of relief before presenting a "taking" claim in federal court. Under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108 (1985), a plaintiff's claim is not ripe until "the government entity charged with implementing the regulations has reached a final decison regarding the application of the regulations to the property at issue." This requires that the plaintiffs seek variances from the regulations. *Id.* at 186-88, 105 S.Ct. at 3117; *see also Lake Nacimiento Ranch Co. v.*

San Luis Obispo County, 830 F.2d 977, 980 (9th Cir. 1987); *Kinzli v. City of Santa Cruz,* 818 F.2d 1449, 1453-54 (9th Cir.), *amended,* 830 F.2d 968 (9th Cir. 1987), *cert. denied,* 108 S.Ct. 775 (1988). A plaintiff must also "seek compensation through the procedures the State has provided for doing so." *Hamilton Bank,* 473 U.S. at 194, 105 S.Ct. at 3121.

Here, although the parties agree that there are no state procedures for such compensation claims, the Lais did not seek a variance. Since both sides have pointed out to us on appeal that other exceptions to the ordinance's height restriction have been granted during the long course of this litigation, we must conclude that the Lais have not yet obtained a "final and authoritive determination of the type and intensity of development legally permitted on the subject property. A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340, 106 S.Ct. 2561, 2566 (1986); *see also Shelter Creek Development Corp. v. City of Oxard,* No. 86-6608, slip op. at 1284-89 (9th Cir. Feb. 2, 1988).

We therefore hold that the Lais do not yet have a justiciable claim.

REVERSED, with orders to **VACATE** the judgment and dismiss the complaint without prejudice.

APPENDIX B

NOT FOR PUBLICATION
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLIFFORD Y.C. LAI and VICTORIA L. LAI,	)	No. 87-1689
	)	D.C. # CV-78-0355-SPK (Hawaii)
Plaintiffs-Appellees,	)	
v.	)	ORDER
CITY AND COUNTY OF HONOLULU, a municipal corporation,	)	
Defendant-Appellant.	)	

Before: ALDISERT, * SKOPIL, and SCHROEDER, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* Honorable Ruggero J. Aldisert, Senior U.S. Circuit Judge for the Third Circuit, sitting by designation.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CLIFFORD Y.C. LAI and VICTORIA L. LAI, Plaintiffs, vs. CITY AND COUNTY OF HONOLULU, a municipal corporation, Defendant.	CIVIL NO. 78-0355 FINDINGS OF FACT AND CONCLUSIONS OF LAW AFTER APPEAL AND REMAND

FINDINGS OF FACT AND CONCLUSIONS OF LAW AFTER APPEAL AND REMAND

FINDINGS OF FACT AND CONCLUSIONS OF LAW AFTER APPEAL AND REMAND

INTRODUCTION:

The Court having considered all the evidence presented at trial, the arguments of counsel, the filings of the parties, and the Court records and files in this case, the following shall constitute the Findings of Fact and Conclusions of Law Following Appeal and Remand, pursuant to Rule 52 of the Federal Rules of Civil Procedure:

I. HISTORY OF THE CASE:

The original complaint herein was filed by Plaintiffs Clifford Y.C. Lai and Victoria L. Lai (hereinafter "LAIS") on September 14, 1978; the subject matter of the action was Plaintiffs' claims for damages and injunctive relief to compensate them for damages and losses arising out of the claimed deprivations of their civil rights by persons acting under color of state law, pursuant to the provisions of 42 U.S.C. § 1983 *et. seq.* Named as Defendants in the complaint were the City and County of Honolulu (hereinafter "Defendant CITY"), the members of the City Council (no longer named defendants), and the department heads for three City agencies responsible for the administration of Defendant CITY's various land use, zoning, and development controls.

The Complaint alleged four basic causes of action arising out of the enactment of Ordinances 4488 and 78-89 by Defendant CITY. Count I alleged that the ordinances were facially unconstitutional as causing a deprivation of property in violation of the LAI's right to procedural Due Process of Law, substantive Due Process of Law, and to the Equal Protection of Law. Count II set forth a claim in inverse condemnation/unconstitutional taking of LAI's property without just compensation, and requested the award of money damages as the remedy. Count III set forth the same legal basis as Count II in inverse condemnation/unconstitutional taking of property without just compensation and requested

injunctive relief restraining the enforcement of the overly restrictive and arbitrary ordinances. Count IV alleged that the subject ordinances were unconstitutionally arbitrary and capricious as applied to the LAIS, in that, as applied, they caused the deprivation of property in violation of the LAI's right to procedural Due Process of Law, substantive Due Process of Law, and to the Equal Protection of Law.

Defendant CITY filed its Answer to Complaint on October ll, 1978; among the defenses raised are failure to state a claim, lack of Plaintiffs' standing to sue, estoppel, immunity, and statute of limitations. Defendant CITY filed a Motion for Summary Judgment on February 29, 1979, which raised the standing and availability of money damages issues; this motion was denied by Order dated July 10, 1979. Defendant CITY filed a Motion to Dismiss, based on the Plaintiffs' alleged failure to answer interrogatories, but this motion was denied by the Court by Order dated November 7, 1979. Defendant CITY filed another Motion for Partial Summary Judgment, raising the statute of limitations issue; this motion was denied by Order dated June 13, 1980.

Plaintiffs LAI sought to amend their Complaint to eliminate the named individual defendants and to proceed to trial only against Defendant CITY. A Stipulation and Order Allowing Plaintiffs to File Amended Complaint was executed by the parties and filed with this Court on December 16, 1981. The Amended Complaint (containing the same claims for relief) was filed on December 16, 1981, and Defendant CITY's Answer to Amended Complaint was filed on January 12, 1982.

A jury-waived trial on the merits was conducted before this Court on November 3, 1982; Defendant CITY defended on the merits of Plaintiffs' claims that their actions in enacting Ordinances 4488 and 78-89, and their official actions thereunder, were unconstitutional and had effected a taking of Plaintiffs' property without just compensation.

Following the reception of evidence, both parties were given time to file simultaneous post trial memoranda on the issues raised at trial. Plaintiffs' LAI filed a detailed Trial Brief on all issues raised on November 15, 1982; of even date therewith Defendant CITY filed a Post Trial Memorandum arguing that a taking had not occurred and that monetary damages were not available against the public municipal corporation.

This Court previously notified Plaintiffs' LAI to prepare and submit to this Court their proposed Findings of Fact and Conclusions of Law holding that the challenged ordinance was "too discriminatory", which they did on February 11, 1983. Defendant CITY was to file objections to the proposed Findings of Fact and Conclusions of Law, but instead on March 10, 1983, it filed a Supplemental Post Memorandum which raised for the first time the CITY's claim that the one year statute of limitations contained in H.R.S. § 657-11 was applicable, citing this Court's decision in *Bill's Crane Service Inc. v. Quisenberry*, 545 F. Supp. 359 (D. Haw. 1982). (E.R. 218-221). Defendant CITY filed of even date therewith its own proposed Findings of Fact and Conclusions of Law devoted exclusively to the statute of limitations issue. At no time did Defendant CITY file any objections to Plaintiffs' Proposed Findings of Fact and Conclusions of Law, but instead relied purely on the statute of limitations argument.

Plaintiffs filed on March 25, 1983, a Supplementary Trial Brief arguing both the inapplicability and the unconstitutionality of H.R.S.§ 657-11. This Court filed its Findings of Fact and Conclusions of Law dismissing the Amended Complaint as untimely pursuant to H.R.S. § 657-11. Judgment was entered in favor of Defendant CITY on May 18, 1983.

Plaintiffs filed a Motion to Amend the Findings of Fact and Conclusions of Law, or Alternatively, for a New Trial, on May 31, 1983. In the meantime, District Judge Fong, faced with many of the same issues in *Matthewman, et.al. v.*

Akahane, et. al. had taken under submission the constitutionality and the applicability of HRS § 657-11.

Prior to the filing on December 14, 1983, of Judge King's Order Denying Motion to Amend Findings of Fact and Conclusions of Law, or Alternatively, for a New Trial, Judge Fong ruled in *Matthewman v. Akahane, supra,* on November 13, 1983, that the one year statute of limitations was unconstitutional and that the applicable statute of limitations was not H.R.S.§ 657-ll. See this Court's Order of December 14, 1983, at 3-4.

Plaintiffs' LAI again requested this Court to reconsider its ruling by way of their Motion to Reconsider Order Denying Motion to Amend the Findings of Fact and Conclusions of Law, or, Alternatively, For a New Trial which was filed with this Court on December 27, 1983, which was denied by this Court without hearing on January 4, 1984.

Plaintiffs' LAI filed their Notice of Appeal from this Court's decision on February 2, 1984, and said appeal in due course gave rise to the decision rendered by the Court of Appeals for the Ninth Circuit on December 14, 1984. Said decision reversed this Court and ruled that the six-year catch-all statute of limitations contained in H.R.S. § 657-l(4) was applicable. See *Lai v. City and County of Honolulu,* ___ F.2d ___ (9th. Cir. 1984).

On December 28, 1984, Defendant CITY filed a Petition for Rehearing, which was denied unanimously by the Ninth Circuit panel on February 4, 1985. This case was then remanded to this Court, which on February 21, 1985, entered its Decision on the merits, as no other factual matters remained to be tried. By that decision, this Court found that Defendant CITY, by its Ordinances 4488 and 78-89 and actions thereunder had taken Plaintiffs' property without just compensation.

II. FINDINGS OF FACT:

1. Plaintiffs LAI are and were at all times herein relevant citizens of the United States and residents of District of Hawaii.

2. Defendant CITY is and was at all times herein relevant a municipal corporation organized and existing under the law of the State of Hawaii, and was so acting under color of State law at all times herein relevant.

3. On May 26, 1971, Plaintiffs LAI bought for $300,000.00 via a sub-agreement of sale a development leasehold interest of approximately sixty-three years in real estate located at 1114 Lunalilo Street, located in the Makiki District of the City and County of Honolulu; the subject property comprises a thirty thousand square foot parcel designated by Tax Map Key; said leasehold consisted of three fixed base rental periods of ten years each expire December 31, 1998, followed by four rental re-openings totalling 35 years which would expire on December 31, 2033.

4. The subject site is centrally located along Lunalilo Street in Makiki, Honolulu, Hawaii. This location offers convenient access to most urban areas of Honolulu, including the Central Business District and other major employment centers.

5. Plaintiffs LAI were able to reduce the price slightly by taking out a first mortgage in order to make an early discounted payoff of the Agreement of Sale in February, 1973.

6. On June 29, 1975, Plaintiff Mr. Clifford Y.C. LAI retired from Pearl Harbor Navy Shipyard, where he had worked since 1942.

7. Plaintiffs LAI had purchased the property for investment purposes, as the LAIS owned no real estate other than their home on 679 Paukai Street.

8. Mr. LAI, who had built his own house many years ago, based his investment decision on the zoning and General plan designation of the subject property, and never considered that he would be denied the right to develop his property in the manner the surrounding area had been developed.

9. After Plaintiffs LAI demonstrated their investment backed expectations by purchasing the leasehold interest in the subject property, Defendant CITY imposed a series of temporary and permanent development controls and restrictions which so adversely affected the development potential of the subject property as to substantially reduce the feasibility of any economic new construction and development.

10. Defendant CITY enacted Ordinance 4488 in order to impose special, unique development controls and restrictions for the portion of the City and County of Honolulu wherein Plaintiff LAI's investment property is situate, as more specifically set forth below.

11. Due to Ordinance 4488 and the later Ordinance 78-89, Plaintiff LAIs have been unable to develop their property as planned or in any economically reasonable manner and are left with an old, dilapidated low-rise development of doubtful future value for development.

12. A density study for the subject property was prepared by Gerald H.W. Lum, AIA. The study considered the subject's development potential prior to August 4, 1975 and under current requirements. It was estimated that prior to August 4, 1975 a likely development would be ll2 units, with an aggregate floor area of 67,536 square feet and a total height of 80 feet. Under Ordinance 4488 and its succeesor 78-89 it was estimated that 51 units with an aggregate floor area of 30,900 square feet with the height restriction of 25 feet would be achievable.

13. Plaintiffs LAI have been denied any and all economic use of that portion of the airspace over the thirty thousand square feet of ground space, in that the Ordinances

and their legislative history clearly indicate that the only stated justification and rationale of such stringent height regulations would be thwarted if Plaintiffs were allowed to use the portion of their airspace above the twenty five foot level in any manner.

14. Plaintiffs are allowed to use the portion of their property which falls below the twenty five foot elevation, but the Ordinances also increased substantially the open space required at ground level, without regard for the concurrent effect of both height and open space requirements.

15. As a result of Plaintiff's inability to develop the property by replacing the existing structures with an economically viable development, Plaintiffs have been forced to constantly repair the structures on the property; the economic data submitted to this Court does not include any calculation for the value of this time.

16. Plaintiff Clifford Y.C. LAI testified that but for the free labor provided by Mr. LAI this development would be even more uneconomical, and Defendant CITY introduced no evidence to contest this evidence.

17. Defendant CITY claims, without proof, that the investment is a money making proposition, but no economist or other evidence has been presented by Defendant CITY which supports that position.

18. Plaintiffs LAI have continued to invest borrowed funds and personal labor into this investment with the knowledge that under the restrictions contained in Ordinances 4488 and 78-89, and in the light of the terms of the lease, they will never recoup their investment or make the development generate a reasonable return on investment.

19. Plaintiffs have tried to sell the project and have received some offers, but none of them produce the return of capital or income which Plaintiffs contemplated or reasonably expected from their investment.

20. Plaintiffs have tried to interest developers with the subject property, but have not been able to interest any responsible developers due to the height and open space restrictions imposed by Ordinances 4488 and 78-89.

21. When this Court reviews the economic evidence realistically, the evidence proves: (l) the LAIS have received no return on their down payment or original investment; (2) the yearly cash flow for ten years has been negative or minimally positive and would be negative throughout if the value of Mr. and Mrs. LAI's personal labor is considered; (3) there is no real hope of development under the existing controls, and; (4) the situation can only deteriorate due to the advanced age of the structures and the future increases (both fixed and to be set) of the lease rental.

22. No evidence has been presented to this Court which would indicate that Ordinances 4488 and 78-89 were enacted pursuant to a comprehensive plan or any community planning; in 1974 Defendant CITY had no Urban Open Space Plan, and it still lacks one at the time of trial herein several years later.

23. There can be no administrative action which would lessen the harsh impacts of the regulation in the instant case, and Plaintiffs have been denied a Certificate of Appropriateness under Ordinance 4488 based purely on the height of their project; no other procedures are available to Plaintiffs, as the regulation makes no provision for any discretion or administrative action.

24. Plaintiffs submitted a development plan to Defendant CITY and exhausted all administrative procedures; Defendant CITY conceded that the proposed development was given a preliminary review and found in compliance with all provisions of the Comprehensive Zoning Code and Building Code, but denied Plaintiffs application for a Certificate of Appropriateness and request for permits to build on said property on September 15, 1976, solely because it would project into the view corridor established by Ordinance 4488.

25. The establishment of a Punchbowl Historical, Cultural or Scenic District (hereinafter "Punchbowl H.C.S.D") was not officially discussed by any agency or official of Defendant CITY until November 13, 1974, although the same was suggested by a 1973 report prepared by John Warnecke and Associates; the impetus for some sort of additional development controls received no action from Defendant CITY until two developments were proposed for construction mauka of Prospect Street at 944 and 982 Prospect.

26. Both of those properties were within the then existing boundaries of the Capital District (Ordinance 4319) which required the developers to obtain Certificates of Appropriateness prior to obtaining a building permit.

27. Those applications for the appropriate certificates and permits prompted Defendant CITY to commence theactions which resulted in Ordinances 4488 and 78-89.

28. Mr. Robert Way, then chief planning official for the City, recommended to Defendant CITY that the City Council "initiate the establishment of a Punchbowl Historic, Cultural, and/or Cultural District encompassing the National Cemetery and areas adjacent to Punchbowl Crater.

29. Defendant CITY's own General Plan and General Plan Revision Program policy recommendations provided that the Punchbowl area was designated to be the primary locale of high density residential development, as the policy recommendation from the planners was that high density residential should be within or adjacent to existing high density development.

30. The meeting of the City Council on February 12, 1975 constituted the end of the administrative proceedings for 944 and 982 Prospect Street and the commencement of the present controversy by the introduction of the bills which later became Ordinance 4488 (Bill 26), the Interim Control Ordinance No. 4487 (Bill 27), and the amendment transferring

the Prospect Street area from the Capital District to the newly created Punchbowl H.C.S.D. (Bill 25)(not an issue here).

31. It is clear that the CITY officials, if not outright recognizing the necessity of compensation, at least knew that the equities were not on the side of Defendant CITY, and that challenges in court might be forthcoming.

32. The "scenic view" created by Defendant CITY did not include a view from any area in Makiki; the "scenic view" corridor established by Ordinance 4488 was for a one block wide corridor immediately adjacent to the elevated portion of the H-1 freeway, where the freeway ran through the urban center of Honolulu with many closely-spaced entries and exits.

33. The other views of Punchbowl from the Makiki area were not studied, and the other available views from the H-1 freeway were not deemed worth preserving by Defendant CITY.

34. Councilman Kaapu, aware of the pending introduction of the trilogy of bills on February 12, 1975, confronted the Council with the questionable legality of its action.

35. Mr. George Moriguchi, Director of Land Utilization, drafted all these proposals, and forwarded his report (Exhibit 18), and Bill 26, (Draft No. 3) to the Planning Commision on March 25, 1975.

36. Exhibit 18 was the only attempt at "Planning" or the establishment of a "Comprehensive Plan" prior to the adoption of Ordinance 4488.

37. Defendant CITY's study also admitted that the view corridor was defined by two masses of highrises, that the views are enhanced by elevation of the viewing platform (H-1 freeway) between Liholiho and Ernest Streets, that Defendant CITY's general plan and detailed land use map both designate Plaintiff's land for "High Density Apartment", that the view of Punchbowl for Ewa bound travelers is obscured between 6th

Avenue and proposed district by high-rise construction, that development has obstructed views of Punchbowl by high-rise construction, that within the district itself, there are no major or significant viewing areas.

38. At the mandatory public hearing, the comments of Council members Clement, Kaapu, Bornhorst, Koga, and Pacarro indicated doubt whether the view from the H-1 was worth preserving.

39. Councilman Pacarro indicated the possibilities of using an improvement district/ad valorem tax to pay the obvious costs and losses caused by the proposed ordinance.

40. The Punchbowl District Advisory Committee, part of the legislative process, made a field trip to the sight and identified three serious defects in the proposed H-1 view corridor as: (a) the view of Punchbowl from H-1 freeway may pass by unnoticed while traveling; (b) it is dangerous for drivers to attempt to observe the Punchbowl view from the freeway, and; (c) the view of Punchbowl is cluttered by high rise buildinge to the point that it is not worth saving.

41. Bill 26, (Draft No. 4) was introduced on May 8, 1975, and this draft (which became Ordinance 4488) replaced the previous seventeen height districts with four height districts of 25, 40, 75 and 240 height restrictions.

42. Ordinance 78-89 substantially amended Ordinance 4488, and expanded the area of control; it also further reduced (for unexplained reasons) the height limit over Plaintiff's property to 25 feet over the entire parcel, and it increased the required open space.

43. Plaintiffs LAI were not contacted in any way by Defendant CITY between 1974 and 1979 with the purpose of soliciting their input or giving them notice of the proposed alterations in the development controls.

44. The planning record and the evidence presented by Defendant CITY fails to demonstrate that the CITY attempted

to do any studies or planning regarding the economic impacts of the ordinances, and nothing was included in the ordinances which in any way sought to ameliorate the economic impacts or spread them among the affected landowners or the public generally.

45. There can be no doubt that the regulation had a significant effect on the economic use of the subject property.

46. Even were this Court to find the economic evidence inconclusive, the LAI's may return to court in the future to again attempt to demonstrate that there remains no reasonable economic use.

47. This Court assumes without deciding that the Ordinances were promulgated for a valid public purpose, but the disposition of this case does not require the Court to take a position on that issue at this time.

48. Plaintiffs Exhibits 39, 39(a), 39(b), 39(c), and 39(d) demonstrate Defendant CITY allowed various other properties which were similarly situated to Plaintiff's property to be developed with high-rise structure, including two that would have been prohibited under the height precincts as originally established by the Moriguchi study of 1975.

49. While Plaintiff has failed to prove to this Court that any of these other developments were allowed special privileges by Defendant CITY, the record does contain evidence that the proposed ordinance was substantially redrafted and altered without any further study or comprehensive plan, and that three alterations caused the burdens of Ordinance 4488 to fall many times more heavily on property owners in the one block area surrounding Plaintiffs' property than on owners in other locations.

50. The loss fee simple value resulting from the imposition of the height limits under Punchbowl District No. 3 as of April 15, 1982 was established at $320,000.

51. This loss in value has been allocated at $275,000 for the leasehold interest and $45,000 for the leased fee interest.

III. CONCLUSIONS OF LAW

1. The establishment of a particularly designated view corridor by Defendant CITY is akin to those historical cases where the public entity took a recognized interest in real property.

2. In the history of taking jurisprudence, it matters little whether a landowner can demonstrate financial loss from public actions which, for example, take a one foot strip along the street frontage of his property, but no court has yet to say that the lack of financial loss means that a taking has not occurred.

3. "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abbrogated.

4. In determining whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.

5. The only objective of that Ordinance was to delineate and acquire a "view corridor" over several neighboring properties, the cost and damages from which were to be borne by the individual owners.

6. No property in the subject area was more burdened by the public acquisition of the view corridor than Plaintiff's, and many properties in close proximity suffered no deprivations or restrictions at all.

7. The enactment of Ordinance 4488 provided windfalls to neighboring properties, and failed to produce the "average reciprocity of advantage of zoning restrictions" which provide the constitutional basis for the exercise of the police powers in zoning cases.

8. Government hardly could go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law.

9. As long recognized, some values are enjoyed under an implied limitation, and must yield to the police power, but obviously the implied limitation must have its limits or the contract and due process clauses are gone.

10. One factor for consideration in determining such limits is the extent of the diminution; when it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.

11. In the instant case the legislative history requires a finding that Defendant CITY really intended to acquire a public right to use the air space/view corridors over the subject properties to the total exclusion of any use by Plaintiffs.

12. Plaintiffs have demonstrated to this Court the type of governmental activity in the instant case is conceptually identical to governmental activity which takes only a portion of the fee interest in a citizen's land, such as a lease for a term of years, a strip of land to widen a street, a sewer easement, or a servitude for the overflow of floodwaters.

13. The general rule is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. It may be doubted how far exceptional cases, like the blowing up of a house to stop a conflagration, go-and if they go beyond the general rule, whether they do not stand as much upon tradition as upon principle.

14. This legal determination is a question of degree, and therefore cannot be disposed of by general propositions.

15. In drafting its land-use regulations in the instant case, Defendant CITY failed in any way to study let alone attempt to ameliorate the economic lipservice to tax relief or "something"; the City did nothing to even attempt to spread the

burdens in a more equitable manner or to adopt a city-wide comprehensive plan.

16. It is the nature of the intrusion into the Plaintiffs' exercise of their property's uses, and not the amount of demonstrable damage flowing therefrom, that the Courts examine to determine whether a taking has occurred.

17. If the government restriction is either not reasonably related to the effectuation of a substantial public purpose, has an unduly harsh impact on the owners use of the property, has frustrated a distinct investment-backed expectations, or may be characterized as an acquisition or appropriation of resources to permit or facilitate a uniquely public function, it will be considered an unconstitutional taking.

18. Defendant CITY may not, under the guise of regulation by zoning, deprive the owner of the reasonable income productive or other private use of his property and thus destroy all but a bare residue of its economic value; such an exercise of the police power would be void as violative of the due process clauses of the State and Federal Constitutions.

19. Plaintiffs property and those properties similarly situated have been singled out from other Makiki/Punchbowl properties and made to bear a disproportionate economic burden.

20. The record proves that the land use regulations at issue involved "reverse spot"' zoning, and that the land use controls were not part of a comprehensive plan for the development of the City to preserve aesthetic values and other general welfare interests of the inhabitants.

21. In the instant case, the conduct of Defendant CITY is more akin to the traditional condemnation case, as Ordinance 4488 and its more restrictive successor, Ordinance 78-89, fail to provide any comprehensive planning, any administrative vehicles for ameliorating losses, any judicial review, and any

evidence to counter the physical trespass inherent in the promulgation of the view corridor.

22. Defendant CITY has not and cannot delineate for this Court any evidence that these factors exist or that any planning was done prior to the adoption of the original ordinance.

23. The fact that the Plaintiffs have only a leasehold interest rather than the complete fee interest is of substantial legal consequence, as Plaintiffs' "investment-backed expectations" must be satisfied in a shorter period of time, with no possibility of "land banking" the subject property for future development.

24. The ultimate legal issue facing this Court is whether justice and fairness require that economic injuries caused by public action be compensatsd by the government rather than remain disproportionately concentrated on a few persons.

25. It is therefore apparent that the taking determination is not as simple and mechanical as the bare language of the "economically viable use" test would seem, at first glance, to suggest.

26. Ordinances regulating the use of land may be attacked as enacted (that is, facially) or as applied. In an "as applied" challenge, an ordinance which might be inoffensive on its face is claimed to have been applied by public officials to a particular parcel in such a way as to produce an unconstitutional (in this case, confiscatory) result. What is being challenged, in other words, is the manner in which administrative officials have treated the Plaintiffs under color of what might otherwise be an unexceptionable ordinance. But whether the ordinance is being attacked on its face or as applied, the taking inquiry requires that the trier of fact examine the precise effect of the terms of the ordinance or of its manner of application on the particular parcel of land at issue, in order to determine whether all viable economic uses

have been precluded, and in order to establieh whether the affected owner will share with other owners the benefits and burdens of the Defendant CITY's excercise of its police power.

27. If a public entity so substantially interfers with the use of private land as to effect a de facto taking, an action lies under the Fifth and Fourtheenth Amendments to recover compensation on a theory of "inverse condemnation."

28. All reasonable use and return on investment has been denied in this case.

29. The actions of Defendant CITY are such that this Court need not reach the issue of what economic criteria are to be utilized by courts in determining the extent of interference necessary to constitute a taking, as the nature and quality of conduct by Defendant CITY indicates that a taking *per se* was effected and the challenged ordinances arbitrarily and capriciously discriminate against Plaintiffs and persons similarly situated and in favor of others in the same locale who will reap windfall benefits and profits.

30. As a direct result of the taking of Plaintiff LAI's property without compensation, Defendant CITY has deprived Plaintiffs of Due Process of Law, Just Compensation, and the Equal Protection of the Law, in violation of the Constitution of the United States and 42 U.S.C. 1983 *et. seq.*

31. Th Court concludes from the evidence in the case and the Court's view of the applicable substantive law that the only meaningful remedy to Plaintiffs LAI at this time (following several years of administrative and judicial proceedings, including an appeal) is for the Court to require Defendant CITY to compensate Plaintiffs LAI through the payment of money damages, interest, attorney's fees, and costs.

32. Although it may be rationally argued that the taking in this case occurred upon the passage of Ordinance 4488 in 1975, the Court instead has concluded that the taking

occurred on September 15, 1976, which is the date upon which Defendant CITY, through its agencies, denied the issuance of the Certificte of Appropriateness.

33. In holding that the remedy of monetary damages is appropriate in the instant case, the Court has concluded that the dimunition of value of a wasting asset such as Plaintiffs' leasehold interest in the subject property, and the loss of any reasonable development potential due to the passage of time during which the Plaintiffs pursued administrative and judicial proceedings and remedies, forcloses any claim by Defendant CITY that Plaintiffs LAI may be justly compensated for their injuries at the present time by a decision of this Court awarding injunctive relief by invalidating Ordinances 4488 and 78-89 and the administrative actions taken thereunder.

34. The Court concludes that the proper remedy in this case is to require Defendant CITY to compensate Plaintiffs by payment to them of damages in the amount of $275,000.00 for the loss of value in their property caused by the acts and omissions of Defendant CITY, together with interest thereon at the rate proscribed by law from the date of the taking until the date of full payment of such judgment.

35. The Court will entertain from Plaintiffs LAI a Motion for Aesessment of Attorney's Fees and Costs, which shall include their attorney's fees and costs incurred during their successful appeal herein.

36. Following this Court's resolution of all issues relating to attorney's fees and costs, the Court will enter a Judgment in conformity with these Findings of Fact and Conclusions of Law upon presentation to this Court by Plaintiffs LAI through counsel for Defendant CITY.

DATED: Honolulu, Hawaii _____

_____

Judge Samuel P. King

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CLIFFORD Y.C. LAI and VICTORIA L. LAI,	) CIVIL NO. 78-0355
Plaintiffs,	)
vs.	)
CITY AND COUNTY OF HONOLULU, a municipal corporation,	)
Defendant.	)

DECISION

The judgment in this case that was entered on May 18, 1982 having been reversed by the Ninth Circuit Court of appeals in an OPINION filed December 14, 1984, in the U.S. Court of Appeals, the matter is before this Court again for decision. The matter was fully tried and is presently submitted.

The former judgment was based upon the application of a 1 year statute of limitations. The Ninth Circuit Court of Appeals ruled that under Hawaii law the applicable period of limitations is 6 years. There are no other factual matters to be tried.

The Court now finds that the City and County of Honolulu by its Ordinances 4488 and 78-89 and actions thereunder have taken Plaintiffs' property without just compensation.

Plaintiffs shall submit new proposed Findings of Fact and Conclusions of Law, including a proposed remedy. Defendant shall have 30 days after service thereof to file any objections to or modifications of Plaintiffs' proposals. If necessary, the Court will call a conference to settle any disagreements.

In the event that either party believes that there have been significant and relevant changes in facts or law since this matter was submitted for trial, a motion to reopen will be considered. Such a motion must be supported by a detailed statement of any additional evidence sought to be introduced and a specific reference to any changes in statutory or case law.

DATED: Honolulu, Hawaii, February 21, 1985.

_____

United States District Judge

CIVIL NO. 78-0355
CLIFFORD Y.C. LAI, et al, vs.
CITY AND COUNTY OF HONOLULU,
a municipal corporation
DECISION

APPENDIX E

ORDINANCE NO. 4488

(BILL NO. 26, 1975)

Ordinance No. 4488 Bill No. 26 (1975)
(Draft No. 6)

A BILL FOR AN ORDINANCE TO ESTABLISH "HISTORIC, CULTURAL AND SCENIC DISTRICT NO. 3, THE PUNCHBOWL DISTRICT."

BE IT ORDAINED by the People of the City and County of Honolulu:

SECTION 1. Legislative Intent

A. Purpose

The significance of the Punchbowl National Cemetery as a National Monument, and its role as one of Hawaii's important historic, cultural and scenic landmarks, has long been recognized. Over the years, however, the pattern of land development and land use changes in the area, have imposed a serious threat to the views of its slopes and waned the serenity of the natural appearance and the sanctity of the Punchbowl Cemetery.

The natural appearance of Punchbowl and the prominent public views of Punchbowl have special historic, cultural and scenic values of local, state, national, and international significance and are in danger of being lost or further diminished through adjacent and surrounding land development.

In accordance with these findings and established public policies, it is necessary to provide a

vehicle by which the historic, cultural and scenic significance of Punchbowl may be preserved and protected.

B. Objectives

The primary objective for the establishment of the Punchbowl District is to protect, preserve and enhance the natural setting and unique character of Punchbowl. More specifically, the objectives are as follows:

(1) To preserve the view of Punchbowl's profile and natural vegetated slope in the area of the scenic overlook as seen from the H-1 Freeway between Piikoi and Pensacola Streets from imminent encroachment by public or private high-rise structures.

(2) To preserve the view of Diamond Head from the Punchbowl overlook from imminent encroachment by public or private high-rise structures in the immediate vicinity of Punchbowl.

(3) To preserve the landscaped open space makai of Punchbowl in A-3 and A-4 Apartment zones.

SECTION 2. Establishment of the Punchbowl District

In accordance with Article 12 of the Comprehensive Zoning Code, Ordinance No. 4319, Historic, Cultural and Scenic District No. 3, the Punchbowl District, is hereby established.

SECTION 3. Punchbowl District Boundary

The District is defined by the Punchbowl District Ordinance Map, Exhibits A and B parcels of land within each precinct identified by Tax Map Key numbers attached hereto and made part of this ordinance.

SECTION 4. Prominent Vantage Points

A prominent public vantage point from which significant public views of Punchbowl exist, for the purpose of this ordinance, is along 430 feet east of Pensacola Street, on the H-1 Freeway.

The other prominent public vantage point is the Punchbowl overlook for views of Diamond Head and the panorama of the City in the Diamond Head direction.

SECTION 5. Design Control System

The District shall consist of 6 general criteria precincts as delineated on the Ordinance Map Special restrictions for the precincts are as follows:

A. Height Regulations

(1) Permitted maximum heights of buildings and structures, including penthouses and mechanical features within the precincts, are delineated on the District Ordinance Map and shall be measured in Precincts A, B, C and D vertically from the existing ground elevation at all points. Height of structures in Precincts E and F shall not exceed 240 feet elevation above sea level.

(2) Exceptions

(a) Exception to the height regulations may be made by the Council for architectural and decorative or recreational features which do not interfere with views such as

roof gardens, landscaped trellis, planter boxes, flag poles, shuffleboard courts and putting greens.

(b) Other exceptions not to exceed the height regulations contained in any underlying zoning district may be considered in accordance with Section 21-1205. The City Council shall set forth findings of fact that the proposed construction would not diminish any existing public views of Punchbowl from the view corridor defined by the district boundary, or is necessary to achieve some public objective of relatively equal or greater importance than listed herein. Such findings of fact shall include the provision of information which provides a basis for the objective in terms of a public need or problem, other reasonable alternatives to achieve the objective and an appropriate analysis of the alternatives which indicate that the proposed construction is the most beneficial to the public's interest.

B. Open Area Requirements

(1) Within the Punchbowl District, the provision of open space shall be in accordance with the Comprehensive Zoning Code requirement provided that all such open spaces shall be accomodated at the ground level.

(2) Parking structures are not permitted in the required open space.

C. Landscaping Regulations

Within the Punchbowl District, the following landscape restrictions and guidelines shall apply:

(1) All open spaces within the District shall be landscaped with trees and in accordance with Section 21-110 (definition of landscaping) of the Comprehensive Zoning Code.

(2) Vacant and/or paved lots, unimproved and temporarily vacant construction sites shall be properly maintained and kept in good visual condition.

(3) Planted screening shall be provided on any side of a parking area adjacent to a street. Such planted screening shall be maintained in good condition at all times.

(4) Any open parking area exceeding 2,500 square feet in ground area shall be lanscaped to a minimum of 10% of the ground area devoted to off-street parking.

D. Street and Utility Improvements

Approval of plans for all subdivision improvements within the District, including but not limited to roads and utilities, shall be preceded by issuance of a certificate of appropriateness for such improvements in accordance with Sections 21-1204 and 21-1205 of the Comprehensive Zoning Code.

E. Architectural Appearance

All final development plans for projects within the District shall include for review and approval by the Department of Land Utilization as to their compliance

with the intent of the Ordinance prior to the issuance of a building permit as follows:

(1) Architectural bulk and treatment plans showing subdued exterior material, texture and color of the proposed structures so as to minimize contrast with the intended character of the District.

(2) Site and building sections showing existing and finished grades as required to show that the proposed building height meets the precinct height requirements.

(3) All apartment structures with flat roofs shall devote at least 20% of the roof area to landscape and/or architectural treatment to subdue the roofs adverse visual impact as seen from the Punchbowl lookout.

SECTION 6. Use Regulations

Within the Punchbowl District, those uses which would enhance the general character of the District shall be permitted. The uses permitted in the underlying zoning districts shall remain applicable. However, no businesses, establishments or uses with noxious odors, noisy and/or aesthetically undesirable operations shall be permitted within the District except in compliance with the provisions of Part E of Article 2 of the Comprehensive Zoning Code and the requirements and objectives of the Punchbowl District.

SECTION 7. Nonconforming Structures

Any structure which does not conform with the Punchbowl District Ordinance may be repaired and maintained in accordance with Section 21-107(d) of the Comprehensive Zoning Code.

SECTION 8. Procedural Requirements

a. Any proposal requiring a permit for construction, alteration, repair, relocation or demolition within the Punchbowl District shall comply with the procedural requirements of

Sections 21-1204, 21-1205, and 21-1207 of the Comprehensive Zoning Code.

b. Application fees for significant projects shall be in conformance with Section 21-1208 of the Comprehensive Zoning Code.

c. All non-significant projects shall be exempt from payment of fees for Certificates of Appropriateness.

SECTION 9. Non-Significant Projects

a. Projects Requiring Certificate of Appropriateness:

Any and all renovations as well as exterior repairs of structures or buildings over 25 feet high, measured from the ground level at all points which do not conflict with the character or visual appearance of the District and all proposals for new structures over 25 feet height which in the Director's determination meet the ordinance requirements and regulations pertaining to height, open area, landscaping and architectural appearance shall be classified as non-significant projects and processed according to the requirements of Section 21-1205 of the Comprehensive Zoning Code.

b. Projects Not Requiring Certificate of Appropriateness:

All interior repairs, renovation and alterations as well as all projects involving structures of less than 25-feet height, measured from the ground at all points, shall be exempt from the Certificate of Appropriateness requirement.

c. Appeals

An aggrieved party may secure a review of any decision of the Director of Land Utilization by appeal to the City Council.

SECTION 10. Significant Projects

Any proposals which in the Director's determination do not meet the ordinance requirements and/or would have a significant adverse impact on the district shall be classified as a significant and shall require the approval of the City Council in accordance with procedural requirements of Section 21-1205 of the Comprehensive Zoning Code.

SECTION 11. Time Limits and Fees

a. Time limits shall be administered in accordance with Section 21-1207 of the Comprehensive Zoning Code.

b. Fees shall accompany all applications in accordance with Section 21-1208 of the Comprehensive Zoning Code.

SECTION 12. Violations

Violation of any provision of this Ordinance shall be punishable in accordance with Section 21-106 of the Comprehensive Zoning Code.

SECTION 13. Severability

The provisions of this Ordinance are declared to be severable, and if any portion of this Ordinance of the application thereof to any person, circumstance, or property is held to be invalid for any reason, the validity of the remainder of this article or the application of such portions to persons, circumstances of property, shall not be affected thereby.

SECTION 14. Effective Date of Ordinance

This Ordinance shall take effect upon its approval.

INTRODUCED by:

Rudy Pacarro
Marilyn Bornhorst
_____
_____
_____
_____
_____
_____
Daniel Clement Jr.
Councilmen

DATE OF INTRODUCTION:

February 12, 1975

_____
Honolulu, Hawaii

APPROVED AS TO FORM
AND LEGALITY:

Claire M. Marumoto
Deputy Corporation Counsel

Approved this 4th day of
August, 1975.

FRANK F. FASI, Mayor
City and County
of Honolulu

APPENDIX F

Revised Charter of the City and County of Honolulu 1973 (1984 Ed.)

Section 6-909. Powers, Duties and Functions-The zoning board of appeals shall:

(a) Hear and determine appeals from the actions of the director of land utilization in the administration of the zoning and subdivision ordinances and any rules and regualtions adopted purusuant thereto. An appeal shall be sustained only if the board finds that the director's action was based on an erroneous finding of a material fact, or that the director had acted in an arbitrary or capricious manner or had manifestly abused discretion.

(b) Hear and determine petitions for varying the application of the zoning ordinance with repsect to a specific parcel of land and may grant such a variance upon the ground of unnecessary hardship if the record shows that (1) the applicant would be deprived of the reasonable use of such land or building if it were used only for the purpose allowed in that zone; (2) the request of the applicant is due to unique circumstances and not the general conditions in the neighborhood, so that the reasonableness of the neighborhood zoning is not drawn into question; and (3) the use sought to be authorized by the variance will not alter the essential character of the locality nor be contrary to the intent and purpose of the zoning ordinance.

The board shall specify the particular evidence which supports the granting of a variance.

APPENDIX G

1978 Cumulative Supplement of the Comprehensive Zoning Code (1969)

Sec. 21-1205. Procedural Requirements.

(a) Certificate of appropriateness for construction, alteration, repair, relocation or demolition within a historic, cultural and/or scenic district. A developer, owner or lessee (holding under a recorded lease the unexpired term of which is more than five years from the date of filing of the application) may file with the Director of Land Utilization an application for a certificate of appropriateness for any proposed construction, alteration repair, relocation or demolition within a historic, cultural and/or scenic district. The Director shall evaluate the project and determine whether it is a nonsignificant or significant project as set forth either by this Article or by ordinance establishing a historic, cultural and/or scenic district within which the project is proposed.

If the project is determined to be non-significant, the Director of Land Utilization shall issue a certificate of appropriateness.

If the project is determined to be significant, the following procedures shall apply.

(1) Supporting documents. The supporting documents to an application for, a certificate of appropriateness shall consist of data on the building's size, appearance and form with sketches and perspectives. Included shall be plans elevations, and sections required to fix and describe the project as to

architectural character, as well as an outline specification setting forth exterior finishes and colors. An area site plan shall be required indicating location and nature of project site improvements and site relationships to surrounding improvements. The Department of Land Utilization shall prepare a summary report of all the material for the project application, including technical design review, and community input, and shall transmit the report and pertinent documents to the Planning Commission and the Council.

(2) Action by the Planning Commission. After receiving the report of the Director, with all pertinent related material, the Planning Commission shall give notice and hold a public hearing. Within 30 days after the hearing, the Commission shall submit its recommendations to the City Council through the Mayor.

(3) Design review and action by the City Council. The City Council shall consider the report of the Director, the recommendation of the Planning Commission and any oral and graphic project presentation to the Council which the applicant or his representative may make. The City Council shall act upon the application, either by issuing a certificate of appropriateness granting the application in whole or in part with or without modifications or conditions, or by denying the application.

(b) Building permit endorsement for significant projects. To protect the special public interest in historic, cultural and/or scenic districts, the Building Superintendent shall refer building permit applications in all such districts to the Department of Land Utilization. No building permit for a significant project shall be issued for the construction, alteration, or repair of any structure within a historic, cultural and/or scenic district and no permit shall be issued for the relocation or demolition of any structure within such district,
except upon a finding by the City Council that the proposed construction, alteration, repair, relocation or demolition is in fact appropriate to the character, appearance and efficient functioning of the district and meets the requirements and objectives established by the City Council in creating such district and an endorsement by the Director of Land Utilization to the effect that the construction documents, as submitted, are in accordance with City Council action. (Sec. 21-1205, R.O. 1969; Am. Ord. 3947, 4319)

APPENDIX H

1978 Cumulative Supplement of the Comprehensive Zoning Code (1969)

Sec. 21-1206. Applicability of Regulations.

In addition to the regulations set forth in the ordinance creating the historic, cultural and/or scenic district, the underlying regulations of the zoning district within which the historic, cultural and/or scenic district is situated shall continue to remain applicable; provided that if any conflict occurs, the more restrictive provisions shall apply. In addition thereto, any proposed development within a historic, cultural and/or scenic district shall be subject to all the provisions of this Article including the requirements of certificates of appropriateness. (Am. Ord. 4319)

Supreme Court, U.S.
FILED
NOV 18 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-680

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

CLIFFORD Y. C. LAI and VICTORIA L. LAI,
Petitioners,

vs.

CITY AND COUNTY OF HONOLULU,
a Municipal Corporation,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT CITY AND COUNTY OF HONOLULU IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Deputy Corporation Counsel
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Attorneys for Respondent
City and County of Honolulu

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE NINTH CIRCUIT PROPERLY APPLIED THIS COURT'S DECISIONS IN HOLDING THAT PETITIONERS DID NOT YET HAVE A JUSTICIABLE CLAIM.

II. WHETHER PETITIONERS' ARGUMENTS CONCERNING ALTERNATIVE RULINGS OR DISPOSITION OF THE CASE BY THE NINTH CIRCUIT ARE INAPPROPRIATE.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

No. 88-680

CLIFFORD Y. C. LAI and VICTORIA L. LAI,
Petitioners,

vs.

CITY AND COUNTY OF HONOLULU,
a Municipal Corporation,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT CITY AND COUNTY OF HONOLULU IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

I.

NATURE OF THE CASE

This case involves a claim of inverse condemnation by Petitioners Clifford Y. C. Lai and Victoria L. Lai (hereinafter "Petitioners" or "Lais") against Respondent the City and County of Honolulu (hereinafter "Respondent" or "City").

The property involved and allegedly "taken" encompasses an area of approximately 30,000 square feet and contains a multi-story building and some duplexes aggregating a total of 25 residential units which are fully rented and occupied. The subject property has been included in the Punchbowl Historic, Scenic and Cultural District. As such, it is subject to various height restrictions and development controls. The Lais allege that since they are prohibited from erecting a 13-story structure due to the provisions of the Ordinance, the City "took" the entire property without compensation.

The Ninth Circuit Court of Appeals in its decision, which is the subject of Petitioners' Writ, determined succinctly and correctly after a detailed and lengthy briefing process that the Lais did not yet have a justiciable claim as their action was not ripe for adjudication. Accordingly, the federal court had no jurisdiction to consider the matter.

II.

STATEMENT OF FACTS

1. The subject parcel of land is located at 1114 Lunalilo Street, Honolulu, Hawaii. This parcel is identified as Tax Map Key No. 2-4-19-41 containing approximately 30,000 square feet.

2. Petitioners purchased a leasehold interest in the subject property in 1971 for $300,000. In 1975, this amount was discounted by the seller to $240,000. In 1976, they received at least three offers to purchase their leasehold interest, one for cash and two in the form of agreements of sale. These latter offers were in the amounts of $475,000 and $520,000, respectively. Notwithstanding the fact that Petitioners were actively seeking a buyer at an asking price of approximately $500,000, all of these offers were summarily rejected because they were allegedly "too low" and not "high enough."

3. The subject property contains 25 residential units which are fully rented and occupied. As indicated by Petitioners' own data sheet, these units have produced a positive cash flow, not including depreciation and tax write-offs in six out of twelve years, totaling about a $25,000 profit.

4. It is the uncontroverted testimony of Petitioners' own expert witness that the property is capable of sustaining a 51-unit residential development, which would comply with the provisions of the challenged ordinance.

5. Respondent is the City and County of Honolulu which is a municipal corporation of the State of Hawaii and is invested with the right, power and capacity to zone and take property for public purpose.

6. In 1975, the City enacted Ordinance No. 4488 which established the Historic, Cultural and Scenic District No. 3, the Punchbowl District, in accordance with Article 12 of the Comprehensive Zoning Code, Amended Ordinance No. 4319. Ordinance No. 4488, among other things, set forth the purpose, regulations and requirements of various projects within the area. The proposed intent of Ordinance No. 4488 was the preservation and enhancement of the natural setting and unique character of Punchbowl National Cemetery and its surrounding areas. This resulted in a 40/25-foot height restriction being designated on Petitioners' property.

7. In 1978, the City enacted Ordinance No. 78-89 which amended and superseded Ordinance No. 4488 extending the Historic, Cultural and Scenic District No. 3, the Punchbowl District, as well as limiting the height to 25 feet.

8. In February 1976, Bok Say Kim, Henry I. H. Kim, Patricia D. Kim and Rose H. Y. Kim, then landowners, through Andrew Aiu and Real Estate Swingers, submitted a Design Evaluation and Certificate of Appropriateness to the City Department of Land Utilization (hereinafter "DLU"). These documents sought approval of plans for a 13-story apartment building with 104 units and 120 parking stalls. Clearly, Petitioners were not involved in this as of this time. Prior to the enactment of Ordinance Nos. 4488 and

78-89, a two-story building consisting of approximately 25 units and some duplexes was located on Petitioners' property. This building still exists today.

9. On February 6, 1976, Andrew Aiu and Real Estate Swingers' application for a Certificate of Appropriateness was received by DLU. A public hearing on the proposed development was held on July 21, 1976 at which time public testimony supporting the application was presented only by the applicants' attorney and an attorney representing the lessee.

10. Following a review, the recommendation was made by the Director of DLU that the application be denied. Reasons for the denial were as follows: 1) substantial diminishing of major public views of Punchbowl; 2) development would not achieve any public objective of equal or greater importance; 3) building would be excessively massive and bulky; 4) the wall area would be approximately 350 percent larger than that permitted by Ordinance No. 4488; 5) the texture and architectural appearance would not be compatible with the existing character of the area; 6) less than ten percent of the flat roof area is devoted to acceptable landscape/architectural treatment (under Ordinance No. 4488, 20 percent is required); 7) the proposed development does not provide sufficient open space on the ground level; and 8) the proposed 13-story building would be incompatible with the one- to three-story buildings which immediately surrounds the property.

11. On September 15, 1976, the Certificate of Appropriateness was recommended for denial by the Planning and Zoning Committee of the City Council based upon the recommendation of the Director of DLU and the Planning Commission.

12. On September 14, 1978, Petitioners filed an action against the City in the District Court under 42 U.S.C. Section 1983.

13. On February 13, 1980, the City filed a Motion for Partial Summary Judgment alleging that the action is barred by the statute of limitations. That motion was denied by the District Court by its Order dated June 13, 1980.

14. Petitioners thereafter filed an Amended Complaint on December 16, 1981. The Amended Complaint requested that they (Petitioners) be awarded just compensation for the entire parcel as it was allegedly taken by reason of Petitioners' inability to fully develop their property.

15. On January 12, 1982, the City answered the Amended Complaint denying that a "taking" of Petitioners' property rights occurred and contending that the two-year statute of limitations had run.

16. On November 3, 1982, a nonjury trial was held before the District Court on Petitioners' claim that their inability to develop their property in a similar manner as the surrounding area had been developed constituted a taking. On May 18, 1983, the District Court entered its Findings of Fact and Conclusions of Law in this matter, concluding that the Complaint was not timely filed and thereby dismissed the action.

17. Petitioners, pursuant to Rules 8, 12, 52 and 59, Federal Rules of Civil Procedure (hereinafter "FRCP"), filed a Motion to Amend the Findings of Fact and Conclusions of Law, or, Alternatively, for a New Trial on May 31, 1983. The District Court, by Order dated December 14, 1983, denied this motion.

18. Petitioners, pursuant to Rules 8, 12, 52, 59 and 60, FRCP, filed a Motion to Reconsider Order Denying Motion to Amend the Findings of Fact and Conclusions of Law, or, Alternatively, for a New Trial, which was denied by Order dated January 4, 1984. Petitioners, pursuant to Rule 4, Federal Rules of Appellate Procedure (hereinafter "FRAP"), and 28 U.S.C. Section 1291, filed a Notice of Appeal on February 6, 1984, appealing this order. On December 14, 1984, the United States Court of Appeals for the Ninth Circuit reversed and remanded the District Court's Order

on the grounds that the District Court applied the incorrect statute of limitations. Subsequently, the District Court on February 21, 1985, reversed and remanded this decision.

19. On December 9, 1985, Petitioners filed a Notice of Motion to Assess Attorney's Fees and Costs against the City, pursuant to 42 U.S.C. Section 1988. The District Magistrate heard Petitioners' motion on February 6, 1986, and on November 13, 1986 made a Report and Recommendation on this matter. On December 26, 1986, the District Court by order adopted and modified the Magistrate's Report and Recommendation.

20. Based upon the District Court's Findings of Fact and Conclusions of Law filed on March 21, 1986 and Order filed January 9, 1987, a judgment was entered in favor of Petitioners against the City in the amount of $657,437.12 on January 9, 1987. On February 5, 1987, the City filed its Notice of Appeal pursuant to 28 U.S.C. Section 1291 and Rule 4, FRAP, to include the Order and Judgment entered on January 9, 1987.

21. Argument before the Ninth Circuit Court of Appeals was held on January 15, 1988. The decision of the Ninth Circuit was rendered on March 7, 1988. The Judgment of the United States District Court for the District of Hawaii was filed on August 9, 1988.

III.

ISSUES

A. The Ninth Circuit Properly Applied This Court's Decisions In Holding That The Lais Did Not Yet Have A Justiciable Claim.

This Court has made it clear that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the

property at issue."*Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 186, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985); *MacDonald, Sommer and Frates v. County of Yolo*, 477 U.S. 340, 106 S. Ct. 2561, 91 L. Ed. 2d 285 (1986). The government decision is not final and not judicially reviewable until the "decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury;...." *Williamson County*, 473 U.S. at 193. In this regard, this Court has established two ripeness thresholds.

First, the property owner must submit a plan of development for the property under existing land use regulations to show if the invasion of its property rights is of sufficient magnitude to have denied the owner the "justice and fairness" guarantee by the Constitution. *Agins v. Tiburon*, 447 U.S. 225, 260, 263, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980). If he is denied approval of the most lucrative or intensive plan under the current regulations, the property owner must then seek approval of another plan or plans that would enable that owner to derive economic benefit from the property. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631, *reh'g denied*, 439 U.S. 883, 99 S. Ct. 226, 58 L. Ed. 2d 198 (1978).

Second, if administrative relief such as a variance or waiver of the current regulations is available, the property owner must seek such relief to minimize the economic impact of the challenged action and its interference with the owner's investment-backed expectations. *Williamson County*, 473 U.S. at 191; *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264, 297, 101 S. Ct. 2352, 69 L. Ed. 2d 1, 29 (1981).

These two thresholds must be reached before a property owner may seek judicial resolution of a claimed taking. *Williamson County*, 473 U.S. at 187-90. If a regulation goes "too far," it may effect a taking or be an invalid exercise of the police power. Determining whether a regulation has gone "too far" requires judicial inquiry into the "economic

impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations."473 U.S. at 191. As this Court said in *Williamson County:*

> Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.

Id.

A court simply cannot determine if the challenged regulations go "too far" until the local government has had the opportunity to decide how it will apply those land use controls to the petitioner. In this regard, the Ninth Circuit Court of Appeals correctly concluded that the lower court would be unable to make such a determination simply because an initial application for development had been denied.

Reaffirming the principles of *Williamson County,* this Court held in *MacDonald v. County of Yolo* that it was unable to determine whether a taking had in fact occurred. In that case, although the developers' initial proposal had been rejected, they had not received a "final definitive position" from the zoning board, leaving open the possibility that some development would be permitted. *MacDonald v. County of Yolo,* 477 U.S. at 351. This Court stressed that:

> Rejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews.

Id. at 353, n.9.

By Petitioners' own admission, a 51-unit residential development on the property would be permitted that would conform to all zoning requirements and restrictions. A proposal for such a development, however, has never been submitted to the City.

In this respect, Petitioners clearly misunderstand the crucial rationale of the finality requirement: A court simply cannot evaluate a regulatory takings claim until plaintiffs have received a final and authoritative determination of the type and intensity of development legally permitted on the subject property. *MacDonald v. County of Yolo*, 477 U.S. at 351 (quoting *Williamson County*, 473 U.S. 172, 87 L. Ed. 2d 126, 105 S. Ct. 3108). As *Agins v. Tiburon, Williamson County* and *MacDonald v. County of Yolo* make clear, there is as yet simply no "concrete controversy regarding the application of the specific zoning provisions." *Agins v. Tiburon*, 447 U.S. at 260.

Further, because Petitioners have made no attempt to alter their initial development proposal does not necessarily mean that the land has no reasonable beneficial uses left or that Petitioners have been denied all reasonable economic value from their land. *MacDonald v. County of Yolo*, 477 U.S. at 347. And if economically viable uses are in the final analysis not permitted by the current land use restrictions, then it would, as the Ninth Circuit Court of Appeals correctly concluded, be incumbent upon the Petitioners to seek variances from those regulations. Variances are available pursuant to Section 6-909 of the Revised Charter of the City and County of Honolulu 1973, as amended.

As stated by this Court in *Williamson County:*

> [I]t is impossible to determine the extent of the loss or interference until the Commission has decided whether it will grant a variance from the application of the regulations.

Williamson County, 473 U.S. at 191, n.12. Moreover, this Court has made clear that mere allegations or opinions by the developer that it has "done everything possible," or that requests for a variance or other relief would be futile will not suffice. *Williamson County*, 473 U.S. at 188, cf. *MacDonald v. County of Yolo*, 477 U.S. at 352, n.8.

Finally, if Petitioners see fit, as *Williamson County* requires them to do, to submit alternate development approvals and any needed variances, "a mutually acceptable solution might well be reached . . . obviating any need to address constitutional questions." *See Williamson County,* 473 U.S. at 187 (quoting *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.,* 452 U.S. 264 at 297)

For whatever reason, however, Petitioners have chosen to skirt the administrative process, choosing instead to bring a premature action without giving the City the opportunity *Williamson County* requires to reach an agreement and make a final decision. Accordingly, the Ninth Circuit Court of Appeals decision correctly recognizes this Court's finality requirements.

B. The Lais' Arguments Concerning Alternative Rulings Or Disposition Of The Case By The Ninth Circuit Are Inappropriate.

This Court has consistently held that unless a claim is ripe, there is no jurisdiction to hear it. *See United Public Workers of America v. Mitchell,* 330 U.S. 75, 89-91, 91 L. Ed. 754 (1947); and Hart and Wechsler's, *The Federal Courts and the Federal System* at 145-46 (2d ed. 1973). Accordingly, because the finality requirements enunciated in this Court's holdings in *Williamson County* and *MacDonald v. County of Yolo* have not been satisfied, the Ninth Circuit properly concluded that the Petitioners did not yet have a justiciable claim. Absent jurisdiction and a justiciable claim, the Petitioners reliance and suggestion of alternative rulings or disposition of the case are clearly misplaced and inapplicable.

IV.

CONCLUSION

Petitioners have failed to show that the Ninth Circuit Court's decision in this above-entitled case is in conflict with the Opinions of this Court. In addition, Petitioners have not shown that alternative rulings or disposition of this case would be applicable absent the presence of a justiciable claim. for the foregoing reasons, the City respectfully requests this Court to deny the Petition for Writ of Certiorari.

DATED: Honolulu, Hawaii, November 18, 1988.

Respectfully submitted,

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City and County of Honolulu

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CLIFFORD Y.C. LAI and VICTORIA L. LAI,
Plaintiffs-Appellees,
v.
CITY AND COUNTY OF HONOLULU, a municipal corporation,
Defendant-Appellant.

No. 87-1689
D.C. No. CV-78-0355-SPK
OPINION

Appeal from the United States District Court
for the District of Hawaii
Samuel P. King, District Judge, Presiding

Argued and Submitted
January 15, 1988—San Francisco, California

Filed March 7, 1988

Before: Otto R. Skopil, Jr. and Mary M. Schroeder, and Ruggero J. Aldisert,* Circuit Judges.

Opinion by Judge Schroeder

SUMMARY

Constitutional Law

Appeal from judgment finding a scenic easement ordinance a taking. Reversed and vacated.

*Honorable Ruggero J. Aldisert, Senior U.S. Circuit Judge for the Third Circuit, sitting by designation.

The court held that appellees' claim is not ripe for failure to seek variance of scenic easement ordinance.

In 1971, appellants the Lais purchased their interest in a lot located near the Punchbowl Crater. In 1974, the Lais entered into an arrangement with a developer, who planned to build condominiums in conformance with the then existing zone height limit. In 1975, appellant City of Honolulu enacted an ordinance establishing a scenic easement to protect one view of the Crater. The ordinance therefore restricted construction height. In 1976, the Lais's developer applied for, but was denied, a Certificate of Appropriateness to build. The Lais sued, challenging the scenic easement imposed upon their property as a taking without just compensation.

[1] A height limitation preserving the public's scenic view is not a taking. [2] As to the merits of appellees' other taking theories, they must pursue all avenues of relief before presenting a taking claim in federal court.

COUNSEL

Ronald B. Mun, Honolulu, Hawaii, for the defendant-appellant.

David Bettencourt, Honolulu, Hawaii, for the plaintiffs-appellees.

OPINION

SCHROEDER, Circuit Judge:

The City and County of Honolulu appeal the district court's money judgment in favor of the Lais in an inverse condemnation action. In 1975, the City enacted a zoning

ordinance, placing restrictions within a designated area on construction more than twenty-five feet above ground level. The purpose was to protect the view of the Punchbowl Crater from the H-1 Freeway. The Lais, owners of a development lease, were denied a Certificate of Appropriateness for their proposed high-rise condominiums due to the zoning ordinance. The Lais sued the City, contending that the ordinance constituted a compensable "taking" of their property, and won a judgment in their favor in the district court. We reverse and remand to the district court with instructions to dismiss because the plaintiffs have no "taking" claim which is yet ripe.

In 1971, the Lais purchased their leasehold interest in a 30,000 square foot lot with rental units in Honolulu. The property is located near the Punchbowl Crater, a historic and scenic attraction. In 1974, the Lais entered into an arrangement with a developer, who planned to build condominium apartments in conformance with the existing zoning height limitation of 350 feet.

In 1975, the City of Honolulu enacted Ordinance Number 4488, establishing the Punchbowl District as Historic, Cultural and Scenic District Number 3. The City's expressed purpose in enacting the ordinance was to establish a scenic easement to protect one view of the Punchbowl Crater from the H-1 Freeway. The ordinance therefore restricted construction more than twenty-five feet above ground level.

In 1976, the Lais' developer requested a Certificate of Appropriateness from the Honolulu City Council to build its condominium apartments. The City Council voted to deny the developer's application, citing eight considerations including the proposed project's height.

On September 14, 1978, the Lais sued the City and County of Honolulu under the Civil Rights Act of 1871, 42 U.S.C. § 1983, challenging the scenic easement imposed upon their

property as a "taking" without just compensation and seeking damages. They also asserted alternative theories for compensation or equitable relief.

[1] The facts established at trial, as found by the district court, showed only that a scenic easement had diminished the value of the plaintiffs' property. However, the Supreme Court has specifically stated that its decisions sustaining land-use regulations that "are reasonably related to the promotion of the general welfare, uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking.' " *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 131, 98 S. Ct. 2646, 2662-63 (1978). The district court found that the Lais could build a 51-unit residential development on the property that would conform to the zoning requirements and restrictions. The inability to reap as great a profit as one might have absent the zoning restriction, does not equate with a "taking." *William C. Haas & Co. v. City and County of San Francisco*, 605 F.2d 1117, 1120-21 (9th Cir. 1979), *cert. denied*, 445 U.S. 928, 100 S. Ct. 1315 (1980). In its most recent pronouncement of last Term, the Supreme Court expressly stated that a height limitation preserving the public's scenic view is not a "taking." *Nollan v. California Coastal Commission*, 107 S. Ct. 3141, 3147-48 (1987). Plaintiffs in this case also alleged alternative "taking" theories which the district court did not reach.

[2] We cannot rule definitively on the merits of any of plaintiffs' theories, however, because the plaintiffs must pursue all avenues of relief before presenting a "taking" claim in federal court. Under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S. Ct. 3108 (1985), a plaintiff's claim is not ripe until "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." This requires that the plaintiffs seek variances from the regulations. *Id.* at 186-88, 105 S. Ct. at 3117; *see also Lake Nacimiento Ranch Co. v. San Luis Obispo*

County, 830 F.2d 977, 980 (9th Cir. 1987); *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1453-54 (9th Cir.), *amended*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 775 (1988). A plaintiff must also "seek compensation through the procedures the State has provided for doing so." *Hamilton Bank*, 473 U.S. at 194, 105 S. Ct. at 3121.

Here, although the parties agree that there are no state procedures for such compensation claims, the Lais did not seek a variance. Since both sides have pointed out to us on appeal that other exceptions to the ordinance's height restriction have been granted during the long course of this litigation, we must conclude that the Lais have not yet obtained a "final and authoritative determination of the type and intensity of development legally permitted on the subject property. A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 106 S. Ct. 2561, 2566 (1986); *see also Shelter Creek Development Corp. v. City of Oxnard*, No. 86-6608, slip op. at 1284-89 (9th Cir. Feb. 2, 1988).

We therefore hold that the Lais do not yet have a justiciable claim.

REVERSED, with orders to VACATE the judgment and dismiss the complaint without prejudice.

Supreme Court, U.S.
FILED
DEC 7 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-680

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

CLIFFORD Y.C. LAI and VICTORIA L. LAI,

Petitioners,

v.

CITY AND COUNTY OF HONOLULU,
a municipal corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONERS LAI'S REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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I. PETITIONERS LAI'S REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

A. Respondent City and County of Honolulu's Brief establishes that no record or factual basis exists for the jurisdictional facts it argues to this Court and the Ninth Circuit panel, which claims are contradicted by the established caselaw and the record in this case.

The two issues raised by Respondent in its Brief of Respondent City and County of Honolulu in Opposition to Petition for Writ of Certiorari are: (a) whether Petitioners LAI "skirted the administrative process" by not seeking a "variance", and; (b) did Petitioners LAI waive their rights to seek compensation by not attempting to proceed with an uneconomical 51-unit development and then seeking damages for their losses. Both of these issues are refuted by the trial court's Findings of Fact and Conclusions of Law after Appeal and Remand. Both of these issues are specious, which accounts for why Respondent is unable to refer this Court to any caselaw, administrative regulations, rejected findings below, or trial testimony. Had the Ninth Circuit panel reviewed these same findings, rather than engage in activist judicial legislation seeking to broaden this Court's holdings in both .*Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194, 105 S.Ct. 3108, 3121, 87 L.Ed.2d 126, 144 (1985)and *Nollan v. California Coastal Commission* ___U.S.___, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987);, it would have realized this case was ripe for substantive review. Since this Court's decisions in those two cases, Respondent City has utilized those opinions to retroactively argue facts and remedies which didn't exist in 1978, and which don't exist today.

District Judge King, far more familiar with both the facts and the purported existence of administrative remedies, ruled:

> Plaintiffs LAI have been denied any and all economic use of that portion of the airspace over the thirty thousand square feet of ground space, in that the Ordinances and their legislative history clearly indicate that

> the only stated justification and rationale of such stringent height regulations would be thwarted if Plaintiffs were allowed to use that portion of their airspace above the twenty five foot level in any manner.

Appendix C of Petition, FF. 13, pp.13a-14a.

> There can be no administrative action which would lessen the harsh impacts of the regulation in the instant case, as Plaintiffs have been denied a Certificate of Appropriateness under Ordinance 4488 based purely on the height of the project; no other procedures are available to Plaintiffs, as the regulation makes no provision for any discretion or administrative action. .

Appendix C of Petition, FF. 23, p. 23a.

Despite these findings, which were not challenged on appeal, Respondent claimed and continues to claim that Petitioners LAI "chose to skirt the administrative process, choosing instead to bring a premature action without giving the City the opportunity *Williamson County* requires to reach an agreement and make a final decision." Brief for Respondent at p.10. These findings are well supported by the record, but the errors in the Ninth Circuit panel opinion offer quality evidence that they failed to read either.

Respondent speaks in terms of Petitioners LAI'S duty to seek "alternative development approvals (sic)" and "plans for development" as if the property at issue were more than a mere 30,000 square foot parcel which required only a single permit for development. Respondent CITY seeks to complicate the issue by impliedly claim-

ing that it, as the "local government", has been denied "the opportunity to decide how it will apply those land use controls to the petitioner." Brief for Respondent CITY at p.8. In reality, no such discretion exists whereby Respondent CITY would be allowed to alter or ameliorate the application of the challenged ordinances to Petitioners LAIS' property, and the lack of such discretion makes the denial of the Certificate of Appropriateness totally and unalterably "final" for purposes of this litigation.

The question which faced Respondent CITY was very simple, to wit: will we allow Petitioner LAI'S development to exceed twenty-five feet, thus projecting into the view corridor it had asserted for itself, or not. This answer to this question does not require a complex development submission, but only a political decision by Respondent CITY to abandon its taking and pay compensation. Even if Respondent CITY desired to alter the application of the singular land use control at issue herein, it has no authority to do so. Respondent CITY's purported gesture is of a remedy other than damages that should have been offered in 1978, not 1988; as Judge King found, money damages are the only remedy.

This Court should not be swayed by the purported remedies which Respondent was unable to offer during eight years of trial court proceedings and which have materialized only after litigation imposed liability. Any such remedy will evaporate into mist the instant this Court denies Petitioner LAIS' Petition, never to be acknowledged again. The purported "variance" would certainly raise the wrath of those political forces which caused Ordinances 4488 and 78-89 to be enacted in the first place, including those who already own and/or occupy high-rise developments who sought to protect their views and increase their own property values at the expense of a few people such as Petitioners LAI who were unfortunate enough to rely upon the zoning granted by Respondent CITY and pursue similar investments.

Ordinance 4488 was strictly drafted to prevent exactly what Respondent CITY now states could occur; the granting of "variances" through any other process than a vote of the entire City Council as a Certificate of Appropriateness would require. The drafters of Ordinance 4488, well aware of the existence of cash-and-

carry politics in the area of zoning and planning, certainly did not intend to allow three appointed members of the Board of Zoning Appeals to have authority to overrule the elected members of the City Council. Ordinance 4488, other than allowing extremely minor encroachments into the view corridor, provided:

> Other exceptions not to exceed the height regulations contained in any underlying zoning district may be considered in accordance with Section 21-1205. The City Council shall set forth findings of fact that the proposed construction would not diminish any existing public views of Punchbowl from the view corridor defined by the district boundary, or is necessary to achieve some public objective of relatively equal or greater importance than listed herein. Such findings of fact shall include the provision of information which provides a basis for the objective in terms of a public need or problem, other reasonable alternatives to achieve the objective and an appropriate analysis of the alternatives which indicate that the proposed construction is the most beneficial to the public's interest.

Ordinance 4488, Sec. A(2)(b); Appendix E to Petition at p.31(a). With these restrictions Respondent CITY enacted to limit its own authority, it would have been futile for Petitioners LAIS to make an "attempt to alter their initial development proposal" as Respondent CITY faults them for failing to do. Brief for Respondent at p.9.

Basic rules of statutory construction dictate the specific provisions of a height ordinance, containing a higher degree of

control and requiring a higher degree of proof to overcome in order to grant a non-conforming Certificate of Appropriateness. Respondent CITY failed to discuss the Certificate if Appropriateness generally or the necessity that it's City Council enter such findings specifically, relying on vague generalizations relating to "variances" instead. Respondent CITY'S references to this variance procedure are mere red herrings seeking to confuse this Court as to the extent of their authority and the allowable variations allowed by the variance process; unfortunately, with no factual record containing this claim, and thus the inability of the factual record to demonstrate such sophistic arguments, the Ninth Circuit panel elevated form over substance in reversing the judgment for Petitioners LAI and accepted this argument hook, line, and sinker, with no analysis whatsoever.

Even the alleged variance discussed by Respondent CITY is applicable to projects which have already been denied a Certificate of Appropriateness, assuming *arguendo* that such procedure is not eliminated by the far more specific Ordinance 4488; itself, a further analysis of the applicable law of variances establishes that the highly-restricted grant of authority contained in the Honolulu City Charter would not allow Respondent CITY any discretion to consider or grant such a variance. Under the City Charter, variances may be granted only under certain very limited situations and would grant limited alterations, and are thus not applicable to the factual record in this case. These restrictions explain why Respondent CITY failed to allude to or litigate this issue below, even when given an opportunity to do so.

Section 6-909(b) of the Revised Charter of the City and County of Honolulu, provides in pertinent part:

> (b) Hear and determine petitions for varying the application of the zoning ordinance with respect to a specific parcel of land and may grant such a variance upon the ground on unnecessary hardship if the record shows that (1) the applicant would be deprived of the reasonable use of such land or building if it were used

> only for the purpose allowed in that zone; (2) the request of the applicant is due to unique circumstances and not the general conditions in the neighborhood, so that the reasonableness of the neighborhood zoning is not drawn into question; and (3) the use sought to be authorized by the variance will not alter the essential nature of the locality nor be contrary to the intent and purpose of the zoning ordinance.
>
> The board shall specify the particular evidence which supports the granting of a variance.

Petition, Appendix F of Petition at 38a. The criteria required to obtain a variance do not exist in the instant case, as there exists no rationale reason to believe that a variance could be utilized to alter the *use* rather than the height of the project, that *the circumstances afflicting Petitioners LAI were unique, that the use sought to be authorized would not alter the essential nature of the locality nor be contrary to the intent and purpose of the zoning ordinance.* Petitioners LAI were in compliance with all underlying zoning for apartment use with a maximum 350 foot height limit, and cannot alter that use by definition. Additionally, the Ordinances 4488 and 78-89 are applicable to their property and neighboring properties, and the general area; under this procedure, Petitioners LAI cannot challenge the height limits imposed on the neighborhood even if Ordinance 4488is deemed as a zoning ordinance.

The Honolulu Charter thus provides a specious remedy at best even under the best of circumstances, and the specific provision relied upon by Respondent CITY has been given a highly restrictive interpretation by the Hawaii Supreme Court. In *McPherson v. Zoning Board of Appeals*, 67 Haw. 603, 699 P.2d 26 (1985), Respondent CITY failed to sustain the correctness of a decision of the Zoning Board of Appeals granting a variance. The Hawaii Supreme Court reversed the granting of a variance as beyond the powers of the Board, and observed:

> One of the problems in this case is that the Charter limits the power of the Board to grant variances to cases where a rather narrow and somewhat technical set of facts must be established.

67 Haw. at 606, 699 P.2d at 29. In view of the restricted scope of relief to alter a use [as opposed to the taking of airspace, Petitioners LAI have no remedy in the Zoning Board of Appeals.

Respondent CITY did not elicit any testimony or present any argument in the trial court which even hinted at the availability of such a variance, and it continues that silence in this Court. Petitioners contend that such claims are mere hot air made only on appeal of this case after a loss in the trial, in the vague hope that this Court will accept this claim as a substitute for their lack of evidence or arguments in the trial court.

B. Respondent City and County of Honolulu misconstrues to this Court the evidence in the District Court relating to the hypothetical 51-unit development.

Respondent CITY also implies in its Brief that no taking occurred in the instant case because of the evidence presented below that a 51-unit residential development would be permitted, and that Petitioners LAI are to be further faulted for not submitting a proposal for such a development. The evidence was not an"admission" by Petitioners LAI, but was in fact the basis for one prong of the economically-viable use evidence in the District Court. Respondent CITY failed to present any evidence below of what type of development could be economical under the height limitations, so Petitioners LAI presented these facts to give the trial Court the best-case picture of the effects of Ordinances 4488 and 78-89.

This evidence, introduced through expert testimony of Petitioners LAI'S appraiser, established that the costs of construction and the nature of the low-rise mandated by the regulations would prevent

any new construction from being an economically-viable alternative to continuing the existing use.

As found by the trial court, such a development was not reasonable, particularly when the same would require extensive capital for very uncertainly likelihood of any return on investment. Judge King found:

> 11. Due to Ordnance 4488 and the later Ordinance 78-89, Plaintiffs LAI have been unable to develop their property as planned or in any economically reasonable manner and are left with an old, dilapidated low-rise development of doubtful value for development.
>
> 12. A density study for the property was prepared by Gerald H.W. Lum, AIA. The study considered the subject's development potential prior to August 4, 1975, and under current requirements. It was estimated that prior to August 4, 1975, a likely development would be 112 units, with an aggregate floor area of 67,536 square feet and a total height of 80 feet. Under Ordinance 4488 and its successor 78-89, it was estimated that 51 units with an aggregate floor area of 30,900 feet with the height restriction would be achievable.

Appendix C of Petition; FF. 11-12, p. 13a. Again, these findings are not challenged but are merely ignored by Respondent CITY. Petitioners LAI'S evidence thus does not support any argument that they have chosen to bypass any rational development of their property involving new construction. As the property is located next to an elevated

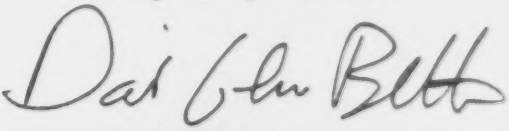
portion of the H-1 freeway, it is uniquely unsuited to any low-rise development and, conversely, it was identified by Respondent CITY, through decision to grant high-rise apartment zoning, as particularly well-suited to high-rise development.

Respondent CITY contends both that no taking existed, but that if one did, it is premature for the District Court to have awarded monetary damages. This Court is invited to review the detailed findings of Judge King, and to consider whether Respondent CITY should, even if this Court considers the ripeness of this case not totally established by these findings, be required on remand to litigate the existence of the purported "variance" and reasonable construction alternatives before Judge King before the drastic step of dismissal.

II. CONCLUSION

The Ninth Circuit's decision creates an untenable state of confusion regarding the nature of Hawaii law; contrary to the established law of this Court and other circuits, the Ninth Circuit panel decision allows municipalities in Hawaii to avoid liability and monetary judgments on the faint hope of an administrative remedy. In the instant case the Ninth Circuit panel grievously erred, when it allowed buzzwords to substitute to correct the excess and error of the decision below, and to adjudicate the required specificity of any state administrative remedy in the Ninth and other circuits, this Court should GRANT this Petition for Writ of Certiorari.

Respectfully submitted,



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